DOCKET

No. 08-495
Title: Manoj Nijhawan, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: October 16, 2008
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (06-3948)
Decision Date: May 2, 2008
Rehearing Denied: July 17, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 14 2008	Petition for a writ of certiorari filed. (Response due November 17, 2008)
Nov 13 2008	Order extending time to file response to petition to and including December 17, 2008.
Dec 17 2008	Brief of respondent Michael B. Mukasey, Acting Attorney General in opposition filed.
Dec 29 2008	Reply of petitioner Manoj Nijhawan filed. (Distributed)
Dec 30 2008	DISTRIBUTED for Conference of January 16, 2009.
Jan 16 2009	Petition GRANTED limited to the following question: "Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million." The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The brief of respondent is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 23 2009	SET FOR ARGUMENT ON Monday, April 27, 2009.
Feb 25 2009	Joint appendix filed. Statement of costs received.
Feb 25 2009	Brief of petitioner Manoj Nijhawan filed.
Feb 26 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Mar 4 2009	Brief amici curiae of Akio Kawashima and Fusako Kawashima filed.
Mar 4 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Mar 4 2009	Brief amici curiae of Asian American Justice Center, et al. filed.
Mar 4 2009	Brief amici curiae of American Civil Liberties Union, et al. filed.
Mar 13 2009	CIRCULATED.
Mar 13 2009	Record received from the U.S.C.A. - 3rd Circuit. (1 box)
Mar 25 2009	Brief of respondent Eric H. Holder, Jr., Acting Attorney General filed. (Distributed)
Apr 15 2009	Reply of petitioner Manoj Nijhawan filed. (Distributed)
Apr 27 2009	Argued. For petitioner: Thomas E. Moseley, Newark, N.J. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioner:		
Thomas E. Moseley Counsel of Record	One Gateway Center Suite 2600 Newark, NJ 07102	(973) 622-8176
Party name: Manoj Nijhawan		
Attorneys for Respondent:		
Curtis Gannon	Assistant to the Solicitor General Department of Justice Washington, DC 20530	
Party name: Eric H. Holder, Jr., Attorney General		
Elena Kagan	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: Eric H. Holder, Jr., Attorney General		
Other:		
Iris E. Bennett	Jenner & Block LLP 1099 New York Ave., NW Suite 900 Washington, DC 20001 Ibennett@jenner.com	(202) 639-6000
Party name: National Association of Criminal Defense Lawyers		
Vincent A. Eng	Asian American Justice Center 1140 Connecticut Avenue, NW Suite 1200 Washington, DC 20036	(202) 296-2300
Party name: Asian American Justice Center, et al.		
Jenny Lin-Alva	Ord & Norman 233 Sansome Street Suite 1111 San Francisco, CA 94104	(415) 274-3890
Party name: Akio Kawashima and Fusako Kawashima		
Jayashri Srikantiah	Immigrants' Rights Clinic Stanford Law School 559 Nathan Abbott Way Oakland, CA 94305	(650) 724-2442
Party name: American Civil Liberties Union, et al.		

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Attorney for Petitioner

218676

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the penalty of life time banishment for conviction of an aggravated felony may be imposed upon a lawful permanent resident under Section 101(a)(43)(M)(i) of the Immigration & Nationality Act of 1952 as amended (the "Act"), 8 U.S.C. § 1101(a)(43)(M)(i) when he was not convicted of the required loss?

Whether the rule of lenity or narrow construction should be applied to resolve an ambiguity in a deportation statute created by both the dissenting opinion below and well-reasoned decisions from other Circuits including the Circuit where the alien's conviction occurred?

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OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 523 F.3d 387 (3d Cir. May 2, 2008) and appears in Appendix A to this Petition at App. 1a-42a. The decisions of the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear in Appendix A to this Petition at App. 44a-51a and App. 52a-61a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2008, and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 17, 2008. (App. 62a-63a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii)

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 11001(a)(43)(M)(i)

> The term "aggravated felony" means—an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

PRELMINARY STATEMENT

At issue in this case is the proper application of the categorical approach in determining whether an alien has been convicted of an offense in which the loss exceeds $10,000. The decision below by a deeply divided panel of the Third Circuit radically departs from the controlling categorical approach in aggravated felony determinations under the Act and literally permits an alien to be deported based upon conduct for which he was not convicted, contrary to the principles established by this Court in *Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990) limiting consideration under sentencing enhancements to what was clearly established in the adjudication of guilt. Furthermore, the decision below reaches this result by jettisoning the categorical approach based upon a misreading of the plain language of the Act requiring a person to have been convicted of the aggravated felony at issue, a result fundamentally at odds with recent decisions of this Court applying the categorical approach. *See, e.g., United States v. Gino Rodriquez*, 128 S. Ct. 1783 (May 19, 2008) and *Begay v. United States*, 128 S. Ct. 1581 (April 16, 2008). In this connection, moreover, the decision below runs directly counter to the structure of the aggravated felony definitions enacted by Congress and creates an entirely new standard of "tethering" loss to conviction, a novel approach entirely divorced from the statutory language, which requires the alien to have been convicted of the loss.

The decision below creates a widening split among the Circuits on this issue. Indeed, as the decision itself expressly acknowledged, under controlling precedent in the Second Circuit, where Mr. Nijhawan's conviction occurred, he was not convicted of an aggravated felony. *See Dulal-Whiteway v. Department of Homeland Security*, 501 F.3d 116 (2d Cir. 2007). Similarly, the recent Ninth Circuit decision in *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir., July 1, 2008) would preclude treatment of the Petitioner's conviction as an aggravated felony under Section 101(a)(43)(M)(i) of the Act, as would the Eleventh Circuit decision in *Obasohan v. U.S. Att'y Gen*, 479 F.3d 785, 788 (11ith Cir. 2007), while the decisions of the Fifth Circuit in *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) and the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006) agree with the panel majority below.

This pronounced split among the Circuits not only creates divergent rules on imposing the harsh penalty of deportation, but also undermines the constitutional requirement of a uniform rule for naturalization mandated by U.S. Const. Art. I, § 8, Cl. 4. Thus a permanent resident convicted of an aggravated felony on or after November 29, 1990 can never establish good moral character for naturalization. *See* 8 U.S.C. § 1101(f)(8). Yet, under the Circuit split, aliens with convictions such as that at issue here would be eligible for naturalization in the Second, Ninth and Eleventh Circuits but not in the First, Third and Fifth, creating precisely the non-uniform rules on naturalization that the Framers sought to avoid. Finally, this recognized Circuit split on an aggravated felony definition is certainly on par with Circuit splits over the meaning of

aggravated felony that led to the grant of certiorari in *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004),

In addition, the decision below overlooks the longstanding rule of lenity or narrow construction dating back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) and most recently reaffirmed by this Court in *Leocal*, 543 U.S at 12 n.8 by which any ambiguity in a deportation provision is to be resolved in the alien's favor given the harsh consequences of removal. Both the persuasive dissent below and well-reasoned decisions of other Circuits agreeing with the dissent make abundantly clear that at the very least such an ambiguity exists. The error in not applying this rule is underscored by the fact that, while the dissent below, following the plain language of the Act, establishes clear rules for the prompt resolution of aggravated felony issues in the Immigration Courts, the majority decision writes a prescription for chaos. Already overburdened Immigration Judges will effectively be forced to retry criminal cases in order to render the factual determinations required under the majority opinion, leaving future appellate panels, already beset with bulging immigration dockets, to define and refine the undefined "tethering" standard set by the decision below but not adopted by Congress.

STATEMENT OF THE CASE

Mr. Nijhawan has lived in this country for over two decades raising a family and working as an accountant with his sole criminal record the conviction involved in this case.

A. *Mr. Nijhawan's Life In The United States*

Mr. Nijhawan was born in India on January 12, 1959 and immigrated to this country as a permanent resident in 1985. He studied accounting and became a licensed CPA. His wife earned a masters degree in nutrition and home economics and has been enrolled in a special education teaching certificate program. The couple has two United States citizen sons, both born in this country. His friends have described him as generous and family oriented.

B. *The Criminal Case*

The criminal conviction underlying removal proceedings arose from Mr. Nijhawan's employment by Allied Deals, Inc. ("Allied"). Following indictment and a multi-defendant trial, a jury in the United States District Court for the Southern District of New York returned a guilty verdict convicting Mr. Nijhawan of Counts One and Thirty of the Indictment. Count One under 18 U.S.C. § 371 charged a conspiracy to violate 18 U.S.C. § 1344, 18 U.S.C. § 1341 and 18 U.S.C. § 1343. Count 30 alleged a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). In charging the jury, the District Court repeatedly instructed that no finding of loss or amount laundered was necessary

for a guilty verdict. The government never requested a special verdict on amount of loss or amount laundered, while Mr. Nijhawan's request for such a verdict was refused. The jury returned only a general verdict of guilty. As the evidence below confirmed and the government conceded, Mr. Nijhawan himself received literally nothing from the loan schemes in which Allied was engaged.

Under the applicable regime for sentencing determinations established by the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 1B1.3, Application Notes 1-2, the District Court was required to fix the controlling guideline level by determining the amount of loss for all relevant conduct, not just that for which Mr. Nijhawan was himself convicted, and do so under a preponderance of the evidence standard. *United States v. Nathan*, 188 F.3d 190, 204 (3d Cir. 1999) (burden of proof for loss at sentencing is preponderance of the evidence). To resolve disputed issues at sentencing, including what was then a pending challenge to the Sentencing Guidelines themselves that would result in *Booker v. United States*, 543 U.S. 220 (2005), Mr. Nijhawan agreed with the government to a Sentencing Guidelines level of 38, based upon a total loss in excess of $100 million for sentencing purposes in order to obtain the right to seek a downward departure of up to 16 levels, putting his sentencing range at 41 to 51 months. In addition, he had to give up the right to appeal his conviction and sentence including raising any *Booker* issue on such an appeal.

At the same time, however, Mr. Nijhawan made clear, with both the government and District Court concurring, that this agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. At sentencing defense counsel advised the District Court that, despite the stipulation for sentencing purposes, Mr. Nijhawan was "looking to reserve on the issue of dollar amounts for another day," in what the District Court expressly recognized would be "another forum." Defense counsel urged that the total loss for sentencing purposes "overstates the seriousness relative to this defendant. And he would like to reserve the right to argue his responsibility for a total dollar figure in the event he finds himself before an immigration tribunal on that definition of so-called aggravated felony." Likewise, in fixing loss and ordering restitution for sentencing purposes in the amount of $683 million jointly and severally, the District Court held and the government *expressly* agreed that this was not a determination that Mr. Nijhawan had caused a loss in excess of $10,000:

> [DEFENSE COUNSEL]: . . . That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. *That's not a finding of over $10,000 specific to this defendant.*
>
> THE COURT: I think that's right. Do you agree with that [Assistant United States Attorney ("AUSA")]?
>
> [AUSA]: Yeah, I think it's right Your Honor, just the loss.

In passing sentence the District Court acknowledged that no finding for sentencing purposes constituted a finding that Mr. Nijhawan had caused a loss greater than $10,000. Furthermore, the District Court recognized this case to have been a "tragic affair" and observed that ". . . I don't believe I've encountered a defendant who's being sentenced who appears to me more equipped, I guess morally and in other ways, to conclude this sorry affair and to make the most of what lies ahead of [him]." Given the totality of all these circumstances, the District Court granted downward departure and sentenced Mr. Nijhawan to 41 months imprisonment, at the bottom of the applicable guideline.

C. *Administrative Proceedings*

Removal proceedings commenced against Mr. Nijhawan while he was serving his sentence at Allenwood Low Security Correctional Institution. The Department of Homeland Security charged him as removable under (1) 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense in violation of 18 U.S.C. § 1956(h) in which the amount laundered exceeded $10,000 and (2) 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of a crime involving fraud or deceit in which the loss to the victim or victims exceeded $10,000. The Immigration Judge sustained both charges in a series of decisions culminating in an order of removal entered February 22, 2006. (App. 52a—61a). On appeal, the Board handed down a single member non-precedent decision dated August 8, 2006 that rested removability

solely upon the Section 101(a)(43)(M)(i) charge.[1] (App. 44a—51a). On the issue of loss, the BIA recognized that loss was not established by the guilty verdict and, instead, decided to "... look beyond the finding of guilty to determine the amount of loss in this case." (App. 49a). Accordingly, the Board made its own independent factual finding of loss based upon what had happened at sentencing, upheld the Section 101(a)(43)(M)(i) charge on that basis and declined to reach the Section 101(a)(43)(D) charge. (App. 49a—51a).

D. *The Court of Appeals Decisions*

A timely petition for review was filed with the Third Circuit on August 31, 2006.[2] After briefing and oral argument on December 11, 2007, a divided panel of the Third Circuit issued majority and dissenting opinions now officially reported at 523 F.3d 387 (3d Cir., May 2, 2008). (App. 1a—43a). While expressly acknowledging contrary authority from other circuits including most recently *Dulal-Whiteway* from the Second Circuit, where Mr. Nijhawan's conviction had occurred, Judge Rendell's majority opinion for herself and District Judge

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1. Under 8 C.F.R. § 1003.1(g) only decisions so designated are considered precedential. *See, e.g., Matter of Yanez*, Int. Dec. 3473 n.8 (BIA 2002) (en banc) holding that reliance cannot be placed upon non-precedent BIA decisions.

2. Following completion of Mr. Nijhawan's criminal sentence and his transfer to the custody of United States Immigration & Customs Enforcement, the Third Circuit issued a stay of removal on October 4, 2007 that was continued on October 22, 2007 pending disposition of the review petition and further order of the Court.

Irenas, sitting by designation, jettisoned the categorical approach for determining whether Mr. Nijhawan had been convicted of an offense that involves fraud or deceit in which the loss exceeded $10,000. (App. 9a). The majority reached this result by reading the "in which" language in Section 101(a)(43)(M)(i) as taking Mr. Nijhawan's case outside the categorical approach demanded by *Shepard* and *Taylor*, which require such determinations to be made in the adjudication of guilt. (App. 9a). In this connection, the majority viewed the loss requirement as the same kind of "qualifier" as those in other aggravated felony definitions that make an offense an aggravated felony only if the offense is one "for which" a sentence of one year or more has been imposed. Concluding that loss did not have to be established in the actual adjudication of guilt, the panel majority held instead that loss need only be sufficiently "tethered" to the conviction and then proceeded to hold that such necessary "tethering" had been shown here. (App. 16a—17a). Noting the conflict among the Circuits on the loss issue, with both the Second and Ninth Circuits in the opposite corner, the majority found support in the decision by the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006). The majority also expressed policy concerns that the Petitioner's position would result in far fewer deportations, while dismissing any concern that the rule adopted would result in insurmountable practical difficulties. (App. 6a, 9a)[3]

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3. The panel majority placed no reliance upon the recent decision by the Board in *Matter of Babaisakov*, 24 I & N Dec. 306 (BIA 2007) departing from the categorical approach with respect to loss under Section 101(a)(43)(M)(i), a decision that like the panel majority suffered from the same disregard for the plain language of the Act and the rule of lenity.

Judge Stapleton's dissent began by noting that the Third Circuit in line with *Shepard* and *Taylor* as well as other Courts of Appeals had presumptively applied the categorical and modified categorical approach to aggravated felony determinations. (App. 28a—29a). This approach, the dissent recognized, begins with what has become known as the "formal categorical approach" involving a comparison between the statute of conviction and the removal provision and if that does not provide an answer, moves to what all Courts of Appeals describe as a "modified categorical approach." (App. 28a—29a). In line with *Shepard* and *Taylor*, the dissent concluded, the modified categorical approach limits analysis to the record of conviction "in order to determine the facts upon which [an alien's] prior conviction actually and necessarily rested." (App. 28a). Such an approach, the dissent concluded, rested squarely upon the plain statutory language, just as with the sentence enhancement provisions in both *Shepard* and *Taylor*, all of which require the person at issue to have been *convicted* of the offense: "The plain language of the [Act], like [the sentence enhancement] mandates that the alien was 'convicted' of the prior offense designated in the [Act] as an 'aggravated felony.' It is not sufficient for the BIA to independently conclude that the alien 'has committed' the prior offense." (App. 29a).

The dissent concluded that the approach adopted by the Second, Ninth and the Eleventh Circuits represented the better approach in contrast to that followed by the First Circuit in *Conteh*. The dissent took issue with *Conteh* as holding that the "conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in [Section 101(a)(43)(M)(i)]." (App. 31a n15). Likewise, the dissent

pointed out the flaw in *Conteh*'s reliance upon restitution orders, which were based upon a preponderance of the evidence and rather than the clear and convincing standard required for removal orders. (App. 31a n.15). The dissent also recognized that the modified categorical approach rested upon fairness concerns and the practical difficulties in having the Immigration Courts retry criminal cases, noting that ". . . if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary." (App. 31a). The dissent held that there was simply no textual support for the panel majority's "tethered" test and found that this new test was not defined here beyond holding it satisfied:

> The holding provides no guidance to the Immigration Judges who will apply [the Act]. Under the standard the Court adopts, for example, would a future IJ be permitted to conclude (under its clear and convincing evidence standard) that the $10,000 loss is established, and is "tethered" to the alien's conviction, by looking to facts in a pre-sentence investigation report . . . or to facts in a police report, or to select evidence presented in the criminal trial, or to new testimony or documents introduced at the removal hearing? The task of defining the "tethered" inquiry will fall to future panels of this court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.

(App. 31a n.15).

Furthermore, the dissent recognized that this case would be the first time an alien would be deported in the Third Circuit for an offense not determined to be an aggravated felony in the adjudication of guilt. (App. 37a). Addressing the conviction record in Mr. Nijhawan's criminal case, the dissent pointed out that the jury was not charged to find any loss and that despite the allegations in the indictment, the "jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss." (App. 35a-36a). With respect to the restitution order, the dissent held that the order suffered from the same deficiency as in *Dulal-Whiteway* since such orders are based upon a preponderance of the evidence and, under the Sentencing Guidelines, encompass all "relevant conduct," not just that for which the defendant was actually convicted. (App. 35a—36a). Similarly, the dissent rejected reliance upon the sentencing stipulation for much the same reasons because

> [t]he stipulation with respect to the application of the Sentencing Guidelines is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.

(App. 36a). While acknowledging that retention of the convicted conduct requirement would produce fewer deportations, the dissent nevertheless held its construction of the Act appeared to be consistent with

Congressional intent reflected in the plain language of the Act and was subject to correction by the legislature. (App. 36a-37a).

Mr. Nijhawan filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which was denied on July 17, 2008 over the dissent of Judge Ambro, who would have granted rehearing. (App. 62a—63a). By order dated July 31, 2008, the Court granted the Petitioner's motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision below not only conflicts with this Court's precedent on statutory construction but also creates a split among the circuits. *See, e.g., Lugar v. Edmonson* Oil Co., 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court."); Supreme Court Rule 10 (conflict among the circuits a basis for certiorari).

A. *A Recognized Circuit Split Exists*

The Third Circuit decision directly conflicts with controlling precedent in the Second Circuit, where Mr. Nijhawan's conviction occurred, as the decision below expressly recognizes. Thus *Dulal-Whiteway*, 501 F.3d at 128 persuasively holds, rejecting reliance upon a sentencing determination and restitution order to establish removability under 8 U.S.C. § 1101(a)(43)(M)(i) that "[f]or conviction following a trial, the BIA may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish

the elements of the offense, as indicated by a charging document or jury instructions." *See also Gertsenshteyn v. United States* Department of Justice, 2008 U.S. App. LEXIS 20331 (2d Cir. Sept. 25, 2008), which reaffirms the categorical approach employed in *Dulal-Whiteway*. Similarly, *Obasohan v. U.S. Att'y Gen*, 479 F.3d 785, 788 (11ith Cir. 2007) rejects reliance upon sentencing determinations as does *Kawashima*[4], which requires loss to be an element of the offense. By contrast the majority opinions in *Conteh* and *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), albeit handed down over strong dissents, allow sentencing determinations to establish loss and thus fall in line with the Third Circuit.

In short, there is a clear circuit split over the controlling rule for imposing what this Court has repeatedly recognized to be a harsh punishment. *See e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("[d]eportation is always a harsh measure"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (deportation is a "drastic measure" where the "stakes are considerable for the individual"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living"). Indeed, the severity of harm from deportation rests upon concerns that literally date back to the founding era with no less an authority than James Madison

4. In the Seventh Circuit, *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) appears to hold that loss under Section 101(a)(43)(M)(i) must be an element of the offense. *But see Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), which departs from the categorical approach on whether an offense constitutes a crime involving moral turpitude.

expressly acknowledging the draconian character of deportation ". . . [I]f a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, "Report on the Alien and Sedition Acts," *Writings* at 623 (Library of America 1999, Jack N. Rakove, ed.). Furthermore, such a split encourages undesirable forum shopping, especially since the government has the ultimate power to transfer aliens facing removal to detention centers in circuits where the law favors the government and yields such anomalies as this case, where the issue is literally a matter of a few miles between the Second Circuit, where the conviction occurred, and the Third Circuit, where removal proceedings were held. *See, e.g., Rosendo-Ramirez v. INS*, 32 F.3d 1085 (7th Cir. 1994), which notes the government's upper hand on forum choice.[5] In this connection, the circuit split in this case contravenes the Founders' intent embodied in U.S. Const. Art. I, § 8, Cl. 4 to establish a uniform rule of naturalization, for aliens in the Second, Ninth and Eleventh Circuits would encounter different rules for determining whether the aggravated felony bar to good moral character existed than would aliens in the First, Third, and Fifth. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 382

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5. This would be especially true for aliens subject to mandatory detention under 8 U.S.C. § 1226(c), as would be the case for all aliens facing removal for conviction of an aggravated felony who had been imprisoned after mandatory detention became effective. *See Demore v. Kim*, 538 U.S. 510 (2003); *Kyei v. INS*, 65 F.3d 279, 284 (2d Cir. 1994) (Court expresses concern about apparent government policy to deny change of venue to alien's residence where alien no longer detained in remote detention facility).

(1971) (holding cited clause imposes an "explicit constitutional requirement" on naturalization eligibility). Finally, this recognized Circuit split is certainly as pronounced as those in *Lopez* and *Leocal*, where certiorari was granted.

B. *The Decision Below Contravenes Plain Statutory Language*

The decision below contravenes the plain language of the Act in tossing aside the categorical approach. As this Court recently reiterated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 128 S. Ct. 815, 818 (2007), this approach has been the uniformly controlling method for determining whether a particular offense falls within a removable category and under what has been referred to as the "modified categorical approach," which permits reference to materials beyond the statute but limits consideration, at most, to what was necessarily established in the adjudication of guilt. *See Shepard v. United States*, 544 U.S. 13, 21-22 (2005) (reversing the First Circuit on the issue of whether the defendant had been convicted of burglary of a building, rejecting that court's reliance upon the fact that the defendant at his federal sentencing had not "seriously questioned" police report findings that he broken into a building, and holding that the categorical approach allows offenses to fall within a particular category, based only upon ". . . conclusive records *made or used in adjudicating guilt*.") (emphasis supplied).

In jettisoning this controlling approach, the majority below relied entirely on the "in which" language in Section 101(a)(43)(M)(i) and ignored the plain language

of the Act as a whole and read the statutory language contrary to its plain meaning and precise English. That flawed approach contravenes this Court's precedent on statutory construction. *See, e.g., Lopez v. Gonzales*, 549 U.S. 1 (2006); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (plain meaning controls in construction of the Act). As Judge Stapleton's dissent forcefully recognized, (App. 33a) the plain statutory language requires that an alien have been *convicted* of an aggravated felony not that he subsequently be found to have committed one[6]. Thus 8 U.S.C. § 1227(a)(2)(A)(iii) expressly provides that only "... an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied)[7]. *See also Dulal-Whiteway, Obasohan*, 479 F.3d at 788 (plain language of Act requires conviction of aggravated felony); *Conteh*, 461 F.3d at 66 (Hug, J., dissenting) (aggravated felony requires conviction). In short, by requiring conviction, Congress has imposed the requirement of proof beyond a reasonable doubt, which effectively answers the argument by the majority below that the dissent would

6. Ironically, the majority begins with the line that Mr. Nijhawan appeals from a determination by the Board that "he had *committed* an aggravated felony. . . ." (App. 2a) (emphasis supplied).

7. Congress certainly knew how to attach adverse immigration consequences to committed criminal conduct but did not do so here. *Compare, e.g.*, 8 U.S.C. § 1101(a)(13)(C)(v)(returning permanent resident alien who has committed specified offenses deemed applicant for admission); 8 U.S.C. § 1182(a)(2) (alien who admits commission of crime involving moral turpitude is inadmissible); 8 U.S.C. § 1182(a)(2)(D) (alien who has engaged in prostitution within specified period is inadmissible).

improperly raise the burden of proof. 523 F.3d at 399. *See also Gertsenshteyn*, 2008 U.S. App. LEXIS 20331 at 22 (the Act "premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been *formally convicted* of in a court of law.") (emphasis in original).

Furthermore, the plain language of the Act defines aggravated felony here in such a way as to leave no doubt that the *entire* definition must be satisfied by conviction. Thus Section 101(a)(43)(M)(i) expressly provides that "aggravated felony" includes "an offense *that* . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ." (emphasis supplied). *See, e.g.*, William Strunk and E.B. White, *The Elements of Style* at 59 (4th Ed. 2000) (relative pronoun "that" introduces restrictive clause). Given the use of the relative pronoun "that" to introduce a restrictive clause, ("involves fraud or deceit in which the loss . . . exceeds $10,000"), the plain meaning of this provision is that not only fraud or deceit but also a loss greater than $10,000 must be established by conviction. While the decision below places dispositive weight on the "in which" language to reject the categorical approach, the majority's approach rips this phrase out of the larger context of a restrictive clause beginning with the word "that" contrary to the plain language of the statute, thereby rendering "that" a nullity and violating the settled rule that every word in a statute must be given meaning. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Furthermore, the "in which" language reinforces the conclusion that the loss must be inside or embodied in the conviction itself, for that would be the plain meaning of "in," especially as used in a restrictive clause beginning with "that." This reading of the statute would be consistent with the admittedly sparse legislative history of Section 101(a)(43)(M)(i), which was included in the Act as part of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 4305. *See* 140 Cong. Rec. H11293 (daily ed. October 7, 1994) (aggravated felony definition expanded to include only "specified" white collar crimes) (emphasis supplied). By contrast, when Congress actually intended to use a qualifier following conviction, where the categorical approach would have no application, the legislature employed the "for which" language in such provisions as Section 101(a)(43(G) (a theft offense "for which the term of imprisonment [is] at least one year"). Significantly, Congress did not provide comparable language in Section 101(a)(43)(M)(i) that an alien be convicted of an offense involving fraud or deceit for which restitution in an amount exceeding $10,000 was ordered at sentencing or an offense for which a loss exceeding $10,000 was found to be "tethered" at sentencing, to borrow the word employed by the panel majority. In any event, the absence of "for which" here would seem to represent a classic example of the controlling principle of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. 432.

Two recent decisions by this Court, one handed down just before and the other just after the decision below, highlight the critical difference in application of the categorical approach. In *Begay v. United States*, 128 S. Ct. 1581 (U.S. April 16, 2008) the issue presented was whether the defendant's prior state driving under the influence convictions constituted violent felonies under the sentence enhancement provision in 18 U.S.C. § 924(e)(2)(B)(ii), which defines violent felony to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Even though this sentence enhancement specifically referred to "conduct," this Court nevertheless applied the categorical approach to resolution of the issue. 128 S. Ct. at 1587. *See also James v. United States*, 127 S. Ct. 1586, 1593 (U.S. 2007) (categorical approach used to determine whether state burglary statute falls within "conduct" clause cited above). By contrast, in *United States v. Rodriguez*, 128 S. Ct. 1783 (U.S. May 19, 2008), this Court rejected the categorical approach where the issue presented was the term of imprisonment. There the defendant faced a sentence enhancement under 18 U.S.C. § 924(e) for a previous conviction of a "serious drug offense," which was defined to require a maximum sentence of ten years and in holding that state sentencing enhancements could be considered to meet the 10 year requirement, the Court rejected application of the categorical approach. In short, this Court's precedent, in line with the dissent below and the plain language of the Act, recognizes a sharp distinction between applying the categorical approach to determine what was established by conviction and in abandoning the approach when the issue is the sentence imposed.

Furthermore, as both the dissent here and in *Conteh* persuasively recognize, allowance of restitution orders to establish loss would radically alter the burden of proof, for those orders are based on a preponderance of the evidence and not the clear and convincing standard required for removability, even assuming loss under Section 101(a)(43)(M)(i) were a factual matter. *See, e.g., In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990) (recognizing that "disparate burdens of proof foreclose application of the issue preclusion doctrine" and citing with approval the *Restatement (Second) of Judgment* comment that clear and convincing evidence is a sufficiently higher standard than preponderance so as to prevent a finding made by preponderance to effect collateral estoppel in a case where proof by clear and convincing evidence is required); *Matter of Carrubba*, 11 I & N Dec. 914 (BIA 1966) (recognizing that clear and convincing is a higher burden of proof than proof by preponderance). In short, the panel majority and not the dissent would radically alter the burden of proof for cases such as this.

In contrast to the panel majority, the dissent sensibly establishes a clear, bright line test grounded in the plain language of the statute, one easy to administer and apply, thus serving to promote the efficient administration of the already overburdened Immigration Courts[8]. The

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8. Some measure of this burden may be seen in the fact that for fiscal year 2007 Immigration Courts nationwide received 334,607 cases and that 278,137 of these were removal proceedings. U.S. Department of Justice: Executive Office for Judicial Review, *FY 2007 Statistical Yearbook* at B4 (April 2008). Similarly, for each year from 2003 to 2007, immigration appeals

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panel majority establishes an uncertain "tethering standard" with no statutory foundation, thus dropping the Immigration Courts into uncharted territory to retry criminal cases, with later appellate panels ultimately burdened to further define and refine a test that Congress itself has not adopted. *Compare Gertsenshteyn*, 2008 U.S. App. LEXIS 20331 at 12, which notes prior Board precedent, *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 335 (BIA 1996), holding that when deportability is based upon conviction the categorical approach is the only "workable approach." Furthermore, as both *Dulal-Whiteway* and the dissent recognize, the Immigration Courts are ill equipped to shoulder this added burden. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (declining to apply exclusionary rule in deportation cases because of the unfamiliarity of Immigration Judges and practitioners with criminal law principles).

To the extent that application of the plain language of the Act may arguably result in fewer deportations this is a policy matter for Congress to address, should such legislative action be deemed necessary in the first place, rather than for a Court of Appeals to create a "tethering test" not enacted by Congress. *See, e.g.*, *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (even if result troubling court must give effect to plain language of the statute, with

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(Cont'd)

made up the vast majority of all agency appeals to the federal circuits. Admin. Office of U.S. Courts *Judicial Business 2007*, Table B-33, U.S. Courts of Appeals, Source of Appeals and Original Proceedings Commenced by Circuit for the 12-Month Periods Ending September 30, 2003 Through 2007 at 98.

correction to come from Congress). Furthermore, adherence to the plain language of the Act would simply underscore the government's need to act in a more coordinated fashion to secure removal of aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court or burdening this Court and other Circuit courts with refining and applying non-statutory "tethering" tests. This would hardly seem to place an insurmountable burden upon the government, which has recently extolled just such coordinated efforts between criminal and immigration enforcement. *See* "85 Sentenced for criminal offenses in one day following a coordinated ICE operation in Iowa. *http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm.* (May 20, 2008).

C. *The Decision Below Overlooked Lenity*

The Court of Appeals also failed to apply the rule of lenity or narrow construction. This controlling rule of construction has both deep roots and modern relevance in immigration law going back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic

> measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

(Emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004) (recognizing rule as basis for decision); *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at, 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien);3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language"). The grounding of this rule in the harm to the alien has particular relevance here, for, as the Third Circuit recognized in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), deportation for conviction of an aggravated felony constitutes a sentence of life-time banishment. *See also Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (deportation a sanction which in severity surpasses all but the most Draconian).

Here both Judge Stapleton's dissent, the persuasive dissents in *Conteh* and *Arguelles-Olivares* and the decisions by the Second, Ninth and Eleventh Circuits validate Mr. Nijhawan's position. Accordingly, a clearer case for application of the rule of narrow construction or lenity could hardly be imagined despite regrettably immoderate language in the panel majority opinion (App. 9a) that no reasonable person could reach the result reached by Judge Stapleton. In the final analysis, given the numbers involved in the sentencing determination, the result reached by the panel majority would seem to provide a text book example of the sage observation by Justice Holmes dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904) that:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 2, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3948

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

Petition for Review of an Order of the
United States Department of Justice
Board of Immigration Appeals
(BIA No. A39 075 734)
Immigration Judge: Walter A. Durling

Argued December 11, 2007

Before: RENDELL and STAPLETON,
Circuit Judges, and IRENAS*, *District Judge.*

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* Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

Appendix A

(Filed May 2, 2008)

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Manoj Nijhawan appeals from the determination of the Board of Immigration Appeals ("BIA") that he had committed an aggravated felony and was thus removable under 8 U.S.C. § 1101(a)(43)(M)(i) because his conspiracy conviction constituted an offense involving fraud or deceit in which the loss to the victims exceeded $10,000. Nijhawan challenges both aspects of this finding, the "involving fraud" prong as well as the "loss" aspect. As to the latter, he contends that, in order to satisfy the qualifying language, the loss amount had to have been adjudicated as part of his conviction, and was not. We reject both challenges and will proceed to address each in turn.

The indictment involved a scheme by individuals who, it was alleged, set out to deprive their victims, major banks, of "hundreds of millions of dollars." A.R. 229. Through a series of misrepresentations, the banks were induced to make a number of loans to the defendants' companies, among them Allied Deals, Inc. Nijhawan, who was the Deputy General Manager of Allied Deals, Inc., was listed in Count 1, the overall conspiracy count that contained the general loss allegation as to the entire fraud scheme and involved conspiracy to commit bank fraud, mail fraud, and wire fraud in violation of 18 U.S.C. § 371, and in Count 30,

which alleged conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The remaining counts were fraud counts implicating one or more of the other defendants in specific fraudulent loans ranging from $163,441 to $2,568,526. The case was tried before a jury, which convicted Nijhawan of all of the counts against him in the indictment. The jury was not asked to, nor did it, determine the amount of the loss attributable to any defendant.

Nijhawan entered into a stipulation for sentencing purposes in which he agreed that, "because the loss from the offense exceeds $100 million, the offense level is increased 26 levels." A.R. 264. In entering the judgment of conviction, the trial judge filled in the space for "loss" with the amount "$683,632,800.23." A.R. 281. The form footnoted the fact that "findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18." A.R. 281. Nijhawan was sentenced to 41 months of imprisonment and ordered to pay restitution in the amount of $683,632,800.23. No appeal was taken.

While Nijhawan was serving his sentence, he was charged with removability under 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense under 18 U.S.C. § 1956 for which the amount laundered exceeded $10,000 and under 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of a crime involving fraud or deceit in which loss to the victims exceeded $10,000. The IJ sustained both charges, relying primarily on the § 1101(a)(43)(D) charge, and entered an order of removal on February 22, 2006.

On appeal, the BIA rested its decision solely on the 8 U.S.C. § 1101(a)(43)(M)(i) charge. A.R. 2 ("We will affirm the decision of the Immigration Judge insofar as he found the respondent removable as an alien convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and (U) of the Immigration and Nationality Act"). The BIA rejected Nijhawan's argument that fraud in the Immigration and Nationality Act ("INA") should be congruent with the common law meaning of the term. As to the loss determination, the BIA agreed that loss was not a necessary element of the offense for which he was convicted, noting that the loss requirement "was used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections." A.R. 4 (citing *Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir.2004)). It reasoned that, although the jury had not found a specific dollar amount in rendering its guilty verdict, the IJ could properly find loss based on the stipulation of facts for sentencing and the judgment of conviction stating that the loss involved is $683,632,800.23, jointly and severally. A.R. 4-5. The BIA held that the stipulation, judgment of conviction, and restitution order were "sufficient to establish that the respondent's conviction renders him removable." A.R. 5.

Nijhawan timely filed a petition for review, appealing the BIA's decision.[1] On appeal, Nijhawan argues

1. After serving his sentence, Nijhawan risked being immediately removed from the United States by United States Immigration and Customs Enforcement. He, therefore, filed a motion for a stay of removal, which we granted pending the resolution of the present appeal.

(1) that his offense of conviction does not involve fraud or deceit as those terms are used in the INA; and (2) that his conviction did not establish that loss to his victims exceeded $10,000.

1. Did the offense "involve fraud"

Nijhawan was convicted of conspiracy to commit fraud in violation of 18 U.S.C. § 371. The INA provision under which Nijhawan was charged with removability provides:

> (43) The term "aggravated felony" means—
>
> . . .
>
> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M)(i). Nijhawan contends that the "fraud" and "deceit" in this provision should be given their common law meaning, which requires actual reliance upon allegedly fraudulent statements made and harm from that reliance. Because actual reliance and harm from reliance are not necessary legal elements of the federal fraud statutes under which he was convicted, *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), his conviction, Nijhawan urges, was not an aggravated felony. We can easily dispense with this argument.

Appendix A

In *Valansi v. Ashcroft*, we examined the very section of the INA at issue here and interpreted the language broadly. 278 F.3d 203 (3d Cir.2002). We said:

> we determine whether the phrase "offense that-involves fraud or deceit" has a plain meaning. The word "involves" means "to have within or as part of itself" or "to require as a necessary accompaniment." *Webster's Third New International Dictionary* at 1191. Thus, an offense that "involves fraud or deceit" is most naturally interpreted as an offense that includes fraud or deceit as a necessary component or element. *It does not require, however, that the elements of the offense be coextensive with the crime of fraud.*

Id. at 209-10 (emphasis added); *see also Bobb v. Att'y Gen.*, 458 F.3d 213, 218 (3d Cir.2006) ("[W]e have held that subsection (M)(i) covers all offenses that have as an essential element an intent to defraud or deceive."); *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 222 (3d Cir.2004) ("Subsection (M)(i) has a general application-the gamut of state and federal crimes involving fraud and deceit causing losses over $10,000.").

Other circuits have followed our lead. *See Conteh v. Gonzales*, 461 F.3d 45, 59 (1st Cir.2006) ("We agree with the Third Circuit. . . . An offense with a scienter element of either intent to defraud or intent to deceive categorically qualifies as an offense involving fraud or deceit."); *James v. Gonzales*, 464 F.3d 505, 508 (5th

Cir.2006) (noting that "[w]e recognize that '[w]hether an offense "involves" fraud is a broader question than whether it constitutes fraud' " and concluding that "[t]he plain language of § 1344 . . . provides that a violation of either subsection necessarily entails fraud or deceit").

Here, the criminal statutes under which Nijhawan was convicted require that fraud or false or fraudulent pretenses be employed (mail fraud, wire fraud, and bank fraud). They therefore "involve" fraud or deceit for the purposes of the INA. Clearly, Nijhawan's arguments to the contrary are foreclosed by our precedent.

2. Was Nijhawan convicted of a fraud "in which the loss to the victims exceeded $10,000"?

[2] Nijhawan was convicted of conspiracy to commit fraud and therefore is subject to removal under 8 U.S.C. § 1101(a)(43)(U), which provides that "an attempt or conspiracy to commit" another aggravated felony constitutes an aggravated felony. The precise aggravated felony provision at issue here defines an aggravated felony as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

As we have noted above, the "involves fraud" language of this provision permits the range of actual offenses to be broader than common law fraud. The issue remains, however, whether the language "in which the loss to the victim or victims exceeds $10,000" requires that a jury have actually convicted defendant of a loss

in excess of $10,000, as Nijhawan contends, or permits resort to the prior criminal record in order to determine what loss was in fact occasioned by or attributable to the offense of conviction.

We conclude that the language of § 101(a)(43)(M)(i) does not require a jury to have determined that there was a loss in excess of $10,000. To read the "in which" language as requiring that what follows must have been proven as an element of the crime would bring about an absurd result. Clearly, the phrase is, as the BIA found, qualifying and does not constitute a provable element. For example, what if the language were "in which the victims were elderly" or "in which three or more banks suffered losses"? Would the facts of these qualifying phrases have to have been proven as part of the offense? We suggest not.

To hold to the contrary would essentially gut every deportability standard containing the "in which" or other analogous qualifying language,[2] for we cannot imagine

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2. 8 U.S.C. § 1101(a)(43)(M)(ii) (conviction for an offense "that is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000"); *see also id.* § 1101(a)(43)(D) ("an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000").

As we noted in *Singh*, analogous provisions include all subsections that limit convictions to those "for which the term

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previous convictions in which an aspect of the crime that is not an element has been proven by the jury. To hold to the contrary would impose a totally impractical standard.

Notwithstanding our belief that reasonable minds could not differ on this issue, we acknowledge that other courts of appeals, and, indeed, Judge Stapleton, have reached a contrary conclusion. They have done so based upon the very argument that Nijhawan makes here, namely that the *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), line of cases require it. We suggest that this reasoning is flawed. The "in which" qualifying language renders the analysis under § 10 1(a)(43)(M)(i) different from the approach in *Taylor* and *Shepard*. In fact, we have already so stated.

In *Singh v. Ashcroft*, Judge Becker explored the contours of the applicability of the *Taylor-Shepard* approach to the concept of "aggravated felony" in the INA. 383 F.3d 144 (3d Cir.2004). Both *Taylor* and

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of imprisonment is at least one year." *Id.* §§ 1101(a)(43)(F), (G), (J), (P), (R), & (S). Also relevant are subsections that exempt from the definition of aggravated felony "the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter." *Id.* §§ 1101(a)(43)(N) & (P).

Shepard involved the question of which court documents or records can be consulted to determine whether a prior conviction qualifies for a sentencing enhancement in a subsequent criminal proceeding.[3] These cases set forth what have become known as the "categorical" and "modified categorical" approaches to determining the crime of which the defendant was previously convicted. The categorical approach looks at the statute of conviction, comparing elements of the offense to the requirements of the enhancing provision. When the formal categorical approach of *Taylor* does not yield an answer, two different types of inquiry may be called into

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3. In *Taylor v. United States*, the Supreme Court held that an enhancement for a prior conviction for "burglary" under § 924(e) required that either the statutory definition substantially correspond to "generic" burglary or the record demonstrate that the jury necessarily found all of the elements of generic burglary in order to convict the defendant. 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

In *Shepard v. United States*, the issue was whether the defendant's prior plea of guilty to burglary, under a statute that included generic burglary as well as nongeneric burglary such as burglary of a boat or motor vehicle, was a conviction for the violent felony of generic burglary under the Armed Career Criminal Act. 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The Supreme Court rejected the notion that police reports or complaint applications could be used to show that the defendant had necessarily pled to the qualifying type of burglary, ruling instead that the sentencing court must look only at the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16, 125 S.Ct. 1254.

play. Judge Becker reviewed our jurisprudence and reasoned as follows regarding the precise issue before us:

> Our jurisprudence in the aggravated felony area—twelve cases in all—is not a seamless web. In order to resolve the appeal we have found it necessary to analyze and synthesize this body of case law, and we do so at length. . . . As will appear, a pattern emerges, causing us to conclude that, while the formal categorical approach of *Taylor* presumptively applies in assessing whether an alien has been convicted of an aggravated felony, in some cases the language of the particular subsection of 8 U.S.C. § 1101(a)(43) at issue will *invite inquiry into the underlying facts of the case, and in some cases the disjunctive phrasing of the statute of conviction will similarly invite inquiry into the specifics of the conviction.*

Singh, 383 F.3d at 148 (emphasis added). Judge Becker thus correctly drew the crucial distinction between deportability language that, on the one hand, calls *Taylor* and *Shepard* into play, inviting inquiry into the specifics of the conviction, and, on the other, is essentially qualifying language not demanding a categorical analysis, but requiring, instead, inquiry into the underlying facts. Cases in which a court has recourse to the modified categorical approach generally involve "divisible" statutes, where the prior criminal offense,

by statute, includes a wide range of activity but the requisite enhancing provision-such as violent felony or aggravated felony-requires one or more particular elements that may or may not have been found as part of the conviction. The modified categorical approach entails scrutiny of the nature of the conviction itself and those elements that the jury necessarily found through an examination of judicial record evidence. If the jury did not necessarily find that element, the "conviction" will not fit within the enhanced category. *Taylor-Shepard* is thus implicated.

On the other hand, the instant enhancing provision is different. The language does not state "convicted of a $10,000 fraud." Rather, it reads, "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). As Judge Becker specifically stated, the provision before us here invites inquiry into "the underlying facts of the case." There is no issue here regarding which crime was committed by the petitioner under a divisible statute, in which event we would be limited to an examination of the "specifics of the conviction" and would employ the modified categorical approach of *Taylor* and *Shepard*.

Addressing the analysis required under the very provision at issue here, Judge Becker made clear that:

> [A] departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue.

Appendix A

The qualifier "in which the loss to the victim or victims exceeds $10,000" in 8 U.S.C. § 1101(a)(43)(M)(i) is the prototypical example—it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue. This principle explains our holdings in *Nugent* and *Munroe.* Another example would be an enumerating statute specifying crimes "committed within the last two years." Such a statute could not be read to cover only crimes which have "within the last two years" as an element; instead a court would read "within the last two years" as a limiting provision on crimes that would otherwise qualify.

In contrast, cases interpreting relatively unitary categorical concepts-like "forgery" (*Drakes*), "burglary" (*Taylor* itself) or "crime of violence" (*Francis* and *Bovkun*)—do not look to underlying facts because the enumerating statute does not invite any such inquiry. Likewise, the hypothetical federal felony trilogy (*Steele, Gerber,* and *Wilson*) asks only whether the elements of a federal criminal statute can be satisfied by reference to the actual statute of conviction; this presents no invitation to depart from *Taylor*'s formal categorical approach and examine the underlying facts.

383 F.3d at 161 (emphasis added). Accordingly, our Court's precedent directs us to "examine the facts at issue," because the amount of loss is a "qualifier," not an element.[4]

Our case law has consistently treated the amount of loss as a qualifier rather than an element of the crime. In 2003 in *Munroe v. Ashcroft*, we did not require that the defendant have specifically pled guilty to a loss amount. 353 F.3d 225 (3d Cir.2003). To the contrary, we stated that "the indictment alleged that the loss exceeded this amount, and Munroe does not claim that when he pled guilty, he admitted to only a lesser loss. Nor is there any suggestion that the Superior Court ever found that the amount of the loss was less than $10,000." *Id.* at 227. For the purposes of § 101(a)(43)(M)(i), we looked to the indictment, which contained an averment as to loss in excess of $10,000, rather than an amended restitution order, which reduced defendant's restitution to $9,999.[5] However, we

4. Our Court's view regarding the meaning of, and inquiry permitted by, 8 U.S.C. § 1101(a)(43) has been referenced approvingly by other courts. *See, e.g., James v. Gonzales*, 464 F.3d 505, 510 n. 26 (5th Cir.2006); *Conteh v. Gonzales*, 461 F.3d 45, 55 (1st Cir.2006). We have also applied its rationale in interpreting other provisions of the INA. *See Joseph v. Att'y Gen.*, 465 F.3d 123, 127 (3d Cir.2006); *Knapik v. Ashcroft*, 384 F.3d 84, 92 n. 8 (3d Cir.2004).

5. The dissent states that the holding in *Munroe* was based on a loss amount "admitted in the plea agreement." This is

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decided that the amount of loss in a restitution order, which by its nature is neither found by a jury nor specifically pled to by a defendant, could be considered. *Id.* at 227 ("[T]he amount of restitution ordered as a result of a conviction may be helpful to a court's inquiry into the amount of loss to the victim if the plea agreement or indictment is unclear as to the loss suffered.").

Nijhawan contends that more recent authority, namely, our opinion in *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir.2006), contradicts *Singh* and *Munroe* and requires conviction of the requisite amount of loss. In *Alaka*, the total loss averred in the indictment as to the overall scheme exceeded $10,000. However, Alaka pled guilty only to a single count in a plea agreement that referenced a loss to the victim of $4,716.68. *Id.* at 92. The other counts against Alaka were dismissed. We concluded that Alaka's offense did not qualify for treatment as an aggravated felony. *Id.* at 108.

Nijhawan urges that *Alaka* stands for the proposition that the loss amount is an element to which

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incorrect as the district court's opinion in that case makes clear. *Munroe v. Ashcroft*, No. Civ. A. 02-2256, 2003 WL 21048961 (E.D.Pa. Jan. 16, 2003) ("In this case, the indictment stated that the fraud involved caused a loss to the victim in excess of $10,000.00. There is no evidence that the defendant pled guilty to any facts other than as alleged in the indictment."). The holdings of both our court and the district court relied on the amount alleged in the indictment and found by the sentencing court, not an amount in the plea agreement.

the defendant must plead, or of which the defendant must be convicted. We disagree. To the contrary, *Alaka* stands for the unremarkable proposition that one who has admitted to a loss of less than $10,000 as part of a guilty plea cannot later be said to have been convicted of an offense involving fraud in which the loss to the victim exceeds $10,000. Where there is a plea agreement that sets forth the loss it is to that agreement we must look to determine the loss. *Alaka* does not require that the defendant plead to a specific loss amount; it requires only that, if he has, that amount is controlling. *Alaka* does not limit the inquiry if no loss is stated in a plea agreement or submitted to a jury. In fact, in *Alaka* we concluded that "the IJ properly considered the factual finding in the sentencing report." *Id.* at 105, 106. *Alaka* requires only that we "focus narrowly on the loss amounts that are particularly tethered to the convicted counts." *Id.* at 107 (quoting *Knutsen v. Gonzales*, 429 F.3d 733, 739-40 (7th Cir.2005)).

The only real issue in the case before us is whether the "tether" of a loss in excess of $10,000 to Count 1, the count of conviction, is sufficiently strong. We have not previously opined as to the nature of the nexus required, or the breadth of the inquiry into the facts as authorized by *Singh*, and, here, we need only determine whether the record is sufficiently clear that the loss resulting from the convicted conduct exceeds $10,000.

Here, Count 1 of the indictment charged a conspiracy, alleging that defendants "engaged in a fraudulent scheme to obtain millions of dollars in loans"

from the victim banks and setting forth the scheme and roles of the co-conspirators. Nijhawan was convicted of Count 1, but the jury did not, and was not asked to, determine the amount of loss to the victims. However, in a stipulation for the purposes of sentencing on Count 1, Nijhawan agreed that the loss exceeded $100 million. And, in entering the judgment of conviction, the District Court made a finding of "Total Loss" in the amount of $683,632,800.23. As in *Munroe,* here we have no argument, let alone anything in the record, that Nijhawan was convicted of an offense involving less than $10,000. This is not a case where the jury's findings contradict the restitution order or loss was calculated on the basis of uncharged or unconvicted conduct. All the documents and admissions support a finding that the loss amounted to hundreds of millions of dollars.

We need not decide whether any of the "facts" here, standing alone, would suffice as a "tether," as we conclude that, taken together, the indictment, judgment of conviction, and stipulation provide clear and convincing evidence that the requisite loss was tied to Nijhawan's offense of conviction.

We note that we are not the only court of appeals to have viewed the inquiry into the record of conviction to permit examination of loss not specifically admitted in the plea colloquy or agreement or found by a jury as part of the conviction.[6] The Court of Appeals for the First

6. Other courts permit a broader inquiry and have allowed loss amount to be established by reference to conduct that (Cont'd)

Circuit also has indicated that a court should look to loss occasioned by the conviction, rather than loss as an element found by the jury or explicitly incorporated in the plea agreement. *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir.2006). Exercising care in interpreting the "loss exceeds" language in § 1101(a)(43)(M)(i), the court recognized that "the distinction between *conviction for* and *commission of* an aggravated felony is an important one; because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone." *Id.* at 56. Thus, the court found it improper for the BIA to rely on a narrative statement in the PSI report, but did approve the BIA's reliance on the indictment, which alleged specific losses exceeding $10,000, and the final judgment, which included a finding of loss and restitution order. *Id.* at 59 (*quoting Shepard*, 544 U.S. at 21, 125 S.Ct. 1254). As here, an indictment and judgment, indicating loss and restitution, were available and were a sufficiently reliable indication of the loss of which the petitioner had been convicted.

In *Knutsen v. Gonzales*, a case upon which we relied in *Alaka*, the Court of Appeals for the Seventh Circuit

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formed part of the same conspiracy as the convicted conduct, a broader inquiry than that we have here. *See Khalayleh v. INS*, 287 F.3d 978 (10th Cir.2002) (where alien pleaded guilty to one count of the indictment which listed a check in the amount of $9,308 but agreed to pay restitution as determined by the sentencing court, the loss from the total scheme to defraud involving other checks could be counted); *see also James*, 464 F.3d at 511-12 (following *Khalayleh*).

similarly reasoned that "consistent with the statute . . . the court should focus narrowly on the loss amounts that *are particularly tethered to convicted counts* alone." 429 F.3d 733, 739-40 (7th Cir.2005) (emphasis added). In that case, the petitioner had pled guilty to one count of a multi-count indictment, which listed a loss amount less than $10,000; for the purposes of the Sentencing Guidelines, however, he entered into a stipulation with the government in which he acknowledged that "the total loss from the offense of conviction and relevant conduct exceeded $20,000." *Id.* at 736. Because the stipulation included relevant conduct and was not limited to the loss connected to or caused by the offense of conviction, the court found that the IJ erred by relying on it, but did not require the plea colloquy to have included the specific loss. *Id.* at 739. The loss was not sufficiently "tethered" to the offense of conviction so as to constitute clear and convincing evidence that the petitioner had been convicted of an aggravated felony under § 1101(a)(43)(M)(i).

The decision of the Court of Appeals for the Eleventh Circuit in *Obasohan v. Attorney General* further substantiates our interpretation of this provision. 479 F.3d 785 (11th Cir.2007). In that case, the petitioner had been ordered to pay restitution, due to fraudulent charges on other credit cards that were not the subject of the indictment or the plea agreement. *Id.* at 789-90. The court found it particularly significant that the petitioner objected to the PSI's assertion of loss due to additional conduct and "therefore did not admit, adopt, or assent to the factual findings that

formed the basis of the restitution order." *Id.* at 790. Given that the restitution order was based entirely on other unconvicted conduct, was not admitted by the petitioner, and was the only evidence that such loss had occurred, the IJ could not find loss by clear and convincing evidence. *Id.* at 790 (gathering cases and citing *Knutsen, Munroe*, and *Conteh* with approval). A restitution order could be evidence of the loss amount, but only if it was "based on the conspiracy charge to which Obasohan pled guilty, [ ]or on the overt acts to which Obasohan admitted by pleading guilty," not "on *additional* conduct that was alleged only in the PSI." *Id.* at 789-90.

We should note that neither we nor these other courts have abandoned the *Taylor-Shepard* approach. Indeed, we still resort to it at the initial phase of our analysis because § 101(a)(43)(M)(i) instructs us to decide whether the alien has been convicted of a crime involving fraud or deceit. Employing the formal categorical approach and looking to the statute of conviction, we determined that Nijhawan's conviction involved fraud or deceit and thus was a proper predicate offense within the "aggravated felony" definition. Once this conclusion is reached, our case law then requires an "inquiry into the underlying facts of the case" to ascertain whether the "in which" qualifying loss provision is satisfied.

Nijhawan urges that we should depart from our case law and follow those courts of appeals that have interpreted the loss requirement in INA

§ 101(a)(43)(M)(i) in a more restrictive way. In particular, he urges that we should adopt the reasoning of the Court of Appeals for the Second Circuit, which has set forth a rule that the loss requirement must be established by "facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions." *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 131 (2d Cir.2007).[7] There, the court determined that, because restitution was not necessarily found by the jury, a restitution order was insufficient to establish that the fraud conviction was one "in which the loss to the victims exceeds $10,000." *Id.* at 130. The Court of Appeals for the Ninth Circuit also applied the "modified categorical" approach to the loss requirement in *Li v. Ashcroft* and found that it was improper to rely on the charging document, which described specific loss amounts, and the judgment of conviction for those counts, because it had "in the record no jury instructions, verdict form, or other comparable document suggesting that the jury actually was called on to decide, for example, that Petitioner's false claims were for a particular amount." 389 F.3d 892, 898 (9th Cir.2004) (expressing no opinion however "as to whether a defendant's admission of a specific sentencing fact would suffice"). As we noted above, we conclude that this treatment of the qualifying language as setting

7. In the case of pleas of guilty the dissent's rule restricts inquiry to "facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript." 501 F.3d at 131.

forth an element of the offense is uncalled for and makes little sense. While our dissenting colleague urges that express conviction of the loss amount will lend certainty and ease to the analysis, we do not think this justifies our embracing an interpretation of the language that will render the provision toothless.

Moreover, our case law clearly rejects the restrictive interpretation of INA § 101(a)(43)(M)(i)'s loss requirement adopted by the Second Circuit in *Dulal-Whiteway* and the Ninth Circuit in *Li. Munroe, Singh*, and *Alaka* make clear that the loss amount need not be found specifically by the jury or set forth in the plea agreement or colloquy.[8] Rather, as we have said, the loss requirement invites further inquiry into the facts underlying the conviction, and that inquiry is satisfied if the amount of loss is sufficiently tethered to the fraud conviction.

Had our prior precedent not compelled our conclusion, we still would firmly disagree with the restrictive interpretation. For, our decision actually fosters the principles the Second Circuit identified in *Dulal-Whiteway* and best comports with the text and purpose of the INA's aggravated felony provision. In *Dulal-Whiteway*, the Second Circuit noted that the words of the INA provision render deportable one who has been convicted of an aggravated felony, not one who

8. In order to reach a contrary result, the dissent labels salient portions of our prior precedent "dicta." *See* dissenting op., n. 9 & 11.

has committed an aggravated felony. *Id.* at 132. We do not disagree with this and, much like the Court of Appeals for the First Circuit in *Conteh*, we endorse careful consideration of the record to determine whether it is sufficiently clear that the loss connected to the crime of conviction exceeded $10,000. As Judge Becker noted in *Singh*, the specific words "in which the loss to the victims exceeds $10,000" suggest just such an inquiry into the facts underlying the conviction. The requirement that we set forth today that the loss amount be sufficiently tied or tethered to the offense of conviction both responds to the Second Circuit's concern that a restitution order based upon conduct of which the defendant was not convicted should not be relied on, and does not arbitrarily cabin the inquiry.[9]

The difficulty in saying that the court will limit inquiry to the precise "record of conviction" used in the

9. The dissent posits that our opinion permits consideration of loss caused by "relevant conduct" rather than the conduct of conviction. This is not correct. By requiring that loss be tethered to the convicted conduct, we are excluding consideration of relevant conduct, as did the Court of Appeals for the Seventh Circuit in *Knutsen* and the Court of Appeals for the Eleventh Circuit in *Obasohan*. In fact, we use the word "relevant" only in discussing these courts' opinions.

Furthermore, there is no conduct in this case other than that underlying the conviction. The dissent incorrectly states that the conduct in Nijhawan's sentencing stipulation pertinent to the Guidelines enhancement and the restitution order includes relevant, as well as convicted conduct, as in *Obasohan*. It does not. In fact, this very clearly distinguishes *Obasahan* and *Knutsen*, cases with which we agree.

Armed Career Criminal context for purposes of determining loss under § 101(a)(43)(M)(i) is made manifest in the decisions of the Court of Appeals for the Ninth Circuit. That court appears to adopt the requirement that the petitioner had to have been convicted of the loss, but then looks beyond what the jury found in order to determine loss amount. For example, in *Ferreira v. Ashcroft*, the court cited our decision in *Munroe* with approval and reasoned that there was no rule prohibiting immigration judges from looking to a restitution order to determine loss amount. 390 F.3d 1091 (9th Cir.2004) (relying on *Munroe* and *Chang v. INS*, 307 F.3d 1185 (9th Cir.2002)). Although the court has insisted that it is using the modified categorical approach, it has actually engaged in a broader inquiry.

Our holding today is consistent with the different evidentiary standards used in criminal, sentencing, and immigration proceedings, respectively. In *Dulal*, the Court of Appeals for the Second Circuit criticized the approach we endorse because, it believed, it "would permit the government to order an alien removed in the absence of the clear, unequivocal and convincing evidence required by [immigration] law." 501 F.3d at 132. However, its holding raises the standard of proof to beyond a reasonable doubt while our holding actually adheres to the "clear and convincing" standard. *Accord Conteh*, 461 F.3d at 56 (rejecting "the implicit proposition that the INA's use of the word "convicted" in 8 U.S.C. § 1227(a)(2)(A)(iii) elevates the government's burden in aggravated felony cases from clear and convincing

evidence to proof beyond a reasonable doubt (that is, proof that facts were necessarily found by a criminal jury or admitted by the alien qua criminal defendant)").

Most fraud statutes, including the federal statutes at issue here, do not contain loss as an element or require that a jury find loss or a defendant plea to a specific loss amount. As we noted above, insistence on loss as part of the conduct would render § 1101(a)(43)(M)(i) largely inoperative, for rarely will a defendant be convicted of a fraud offense with loss as an element found by the jury or explicitly admitted to in a guilty plea. Under the rule adopted in *Dulal-Whiteway* which the dissent embraces, a finding beyond a reasonable doubt would be required, not merely the allegation of a specific loss amount in a criminal indictment.[10] A jury would have to be charged as to loss amount and make a specific and additional finding.[11]

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10. In fact, *Li*, upon which the dissent relies, did not consider the charging document which listed specific loss amounts and the judgment of conviction on those counts to be sufficient to prove the loss amount precisely because the jury was not required to find a loss amount to a guilty verdict. 389 F.3d at 898. Here the prosecutor did in fact include the loss amount in the criminal indictment.

11. It would necessarily be the prosecutor who would request this charge, for, if the rule espoused in *Dulal-Whiteway* applies, defense counsel would be content *not* to have the loss found by the jury. We must wonder why the prosecutor would ever ask the jury to find a fact not relevant to the conviction.

Unlike the Second Circuit, we find no " 'daunting' practical difficulties" associated with looking to a wider array of records that possess a high indicia of reliability. It is well within the competence of a court to examine the record for clear and convincing evidence of loss caused by the conduct of conviction. Indeed, we believe there are far greater practical difficulties inherent in attempting to bend the "modified categorical approach" of *Taylor* and *Shepard* to apply to a finding of the requisite minimum loss caused by fraud or deceit, which is rarely found by a jury or explicitly included in the plea agreement, because it is a qualifier, not an element of the offense. Moreover, we should not raise an aspect of an immigration statute to the level of an element of a criminal offense, as the dissent urges, merely because requiring that it be a part of the conviction eases a court's decision-making process.

Accordingly, because the petitioner was previously convicted of conspiracy to commit "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," he committed an aggravated felony, and we will deny his petition for review.

STAPLETON, Circuit Judge, dissenting:

I agree with the Court that Nijhawan's conviction for conspiracy to commit bank fraud, mail fraud and wire fraud constituted a conviction for conspiracy to commit an offense "that involves fraud or deceit" as defined by the INA. I therefore join Section 1 of the Court's opinion. I disagree, however, with the Court's conclusion that prior decisions of this Court compel the approach to the § 1101(a)(43)(M)(i) loss element that the Court adopts, and I believe that our Court should retain the INA's conviction requirement for that element. I would therefore grant the petition for review.

Under the Immigration and Naturalization Act ("INA"), "[a]ny alien who is *convicted* of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added). The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) to include, *inter alia*, "an attempt or conspiracy to commit" "an offense that-(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.* at §§ 1101(a)(43)(M)(i), 1101(a)(43)(U). Therefore, under the plain language of the INA, petitioner is removable only if he was "convicted" of a conspiracy to commit "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.*

Several Courts of Appeals, including ours, presumptively apply some variant of the "categorical approach" first articulated by the Supreme Court in

Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and further explained in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to determine whether an alien's prior conviction qualifies as an "aggravated felony." Courts of Appeals have diverged, however, regarding how a reviewing court should determine whether an alien's prior conviction satisfies the $10,000 loss requirement of § 1101(a)(43)(M)(i). Although all Courts of Appeals permit the reviewing court to look beyond *Taylor's* "formal" version of the categorical approach—a simple comparison of the elements of the prior statute of conviction to the INA definition—and allow recourse to the "record of conviction" to some degree, courts disagree regarding the precise nature of that further inquiry. The Courts of Appeals for the Second and Ninth Circuits, and, as I read its precedent, the Eleventh Circuit, have adopted a "modified categorical approach" in which the reviewing court looks to the record of conviction in order to determine the facts upon which the petitioner's prior conviction actually and necessarily rested.[12] In contrast, the Court of Appeals for the First Circuit allows a broader inquiry under which immigration courts may scrutinize other facts, gleaned from the alien's record of conviction, to independently determine, by clear and convincing evidence, whether the crime resulted in a loss greater than $10,000.[13] I find

12. *Dulal-Whiteway v. U.S. Dep't of Homeland Security*, 501 F.3d 116, 128 (2nd Cir.2007); *Li v. Ashcroft*, 389 F.3d 892, 895-98 (9th Cir.2004); *Obasohan v. Attorney General*, 479 F.3d 785, 788-89 (11th Cir.2007).

13. *See Conteh v. Gonzales*, 461 F.3d 45 (1st Cir.2006).

the approach of the Courts of Appeals for the Second and Ninth Circuits to be the better reasoned approach.

The Supreme Court articulated the *Taylor-Shepard* categorical approach when reviewing 18 U.S.C. § 924(e), which provides for a sentencing enhancement if a defendant has been convicted of certain enumerated prior offenses. The Courts of Appeals have transplanted that categorical approach into the INA because of obvious similarities between the two inquiries. The plain language of the INA, like § 924(e), mandates that the alien was " *convicted* " of the prior offense designated in the INA as an "aggravated felony." It is not sufficient for the BIA to independently conclude that the alien "has committed" that prior offense. Therefore, the INA, like § 924(e), requires a comparison of the *prior conviction* to the generic definition of the pertinent aggravated felony-in this case, §§ 1101(a)(43)(M)(i) and (U).

The rationale is not just a textual one, however. Courts have adopted categorical approaches for the INA also because the INA inquiry involves the same sorts of practical difficulties and fairness concerns underlying the Supreme Court's decisions in *Taylor* and *Shepard*. As the Second Circuit explained, "the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions." *Dulal-Whiteway*, 501 F.3d at 132. *See also id.* ("we decline the invitation to piece together an underlying attempt conviction by weighing evidence and drawing conclusions in a manner appropriate only for a criminal jury") (quoting *Sui v. I.N.S.*, 250 F.3d 105,

119 (2nd Cir.2001)); *Shepard*, 544 U.S. at 23, 125 S.Ct. 1254 (a purpose of the categorical approach is the "avoidance of collateral trials"). As the Second Circuit also recognized, the categorical approach promotes basic precepts of fairness. *Id.* at 133 (" '[I]f the guilty plea to a lesser, [non-removable] offense was the result of a plea bargain, it would seem unfair to [order removal] as if the defendant had pleaded guilty to [a removable offense].' [*Taylor*, 495 U.S.] at 601-02 [110 S.Ct. 2143]. By permitting the BIA to remove only those aliens who have actually or necessarily pleaded to the elements of a removable offense, our holding promotes the fair exercise of the removal power").[14] In sum, I agree with the Court of Appeals for the Second Circuit that the same practical and fairness difficulties identified by *Taylor* and *Shepard* would attend an interpretation of the INA that allowed immigration courts to reopen the factual record of prior criminal convictions and

14. The Court of Appeals for First Circuit found such fairness concerns less than compelling because *Shepard* had emphasized that, in the context of sentencing enhancements under § 924(e), those concerns also raise Sixth Amendment problems, and such constitutional concerns are inapplicable in civil removal proceedings. *Conteh*, 461 F.3d at 55. However, *Taylor* and *Shepard* were rooted in basic notions of fairness that extend beyond the protections of the Sixth Amendment, and we, like the Second Circuit, began to adopt categorical approaches for the INA before *Shepard* articulated its Sixth Amendment rationale. *Dulal-Whiteway*, 501 F.3d at 132-33. *See Shepard*, 544 U.S. at 20, 125 S.Ct. 1254 ("certainly, 'the practical difficulties and potential unfairness of a factual approach are daunting,' no less in pleaded than in litigated cases") (internal citation omitted).

undertake new factual findings, utilizing a different standard of proof, to determine whether a required element (a $10,000 loss) was met. Indeed, if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary.[15]

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15. The Court concludes that the loss must merely be found by the Immigration Judge and BIA under their "clear and convincing evidence" standard and be "tethered" to the conviction. The Court does not define the "tethered" test further but merely holds that it is satisfied by the facts of this case. The holding provides no guidance to the Immigration Judges who will apply Sections 1227(a)(2)(A)(iii) and 1101(a)(43)(M)(i). Under the standard the Court adopts, for example, would a future IJ be permitted to conclude (under its clear and convincing evidence standard) that the $10,000 loss is established, and is "tethered" to the alien's conviction, by looking to facts in a pre-sentence investigation report ("PSI"), or to facts in a police report, or to select evidence presented in the criminal trial, or to new testimony or documents introduced at the removal hearing? The task of defining the "tethered" inquiry will fall to future panels of this Court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.

The First Circuit, the only other court to have deviated from the modified categorical approach, sought to provide answers to these questions in *Conteh*, but that opinion demonstrates the analytical difficulty of defining the loss inquiry once it is divorced from the conviction requirement. *Conteh* made two fundamental rulings regarding the loss inquiry. *Conteh* first ruled, as does the Court today, that the INA does not require a convicted loss but rather merely a determination by the IJ, under its ordinary clear

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(Cont'd)

and convincing evidence standard, that the loss requirement is satisfied. *Conteh*, 461 F.3d at 55-56. This ruling allowed it to conclude that the IJ did not err by relying on a restitution order, which could have included "relevant" but un-convicted conduct and facts found by a mere preponderance of the evidence. *Id.* at 59. *Conteh* next, however, joined every Court of Appeals to have addressed this issue by ruling that the inquiry is limited to the "record of conviction." *Id.* at 57. In reaching this latter ruling the Court "emphasize[d] that the difference between [its] approach and that of the Ninth Circuit [which the Second Circuit subsequently joined] is only a matter of degree," *id.* at 56, and it agreed that "because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone." *Id.* Based on this second ruling, the Court concluded that the IJ *did* err by looking to a PSI and to testimony presented in the removal hearing: the Court reasoned that restitution orders (memorialized in the final judgment) were part of the "record of conviction," but that the other two types of evidence were not. *Id.* at 57-59. The Court allowed recourse to restitution orders by ruling, as does the Court today, that the alien need not have been actually convicted of a loss; however, the Court rejected the IJ's other two sources of evidence because they fell outside of the "record of conviction" as that Court defined it, a limit which must derive from the conviction requirement. In other words, the Court found that the INA's conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in § 1101(a)(43)(M)(i). I also note that allowing unqualified reliance upon restitution orders would allow future IJs to look to facts a prior sentencing court may have found by a mere preponderance of the evidence and to elevate those facts to the higher "clear and convincing evidence" standard, without the benefit of having the underlying evidence before it.

Appendix A

Because of the plain language of the INA, as well as the practical and fairness concerns that I have discussed, I am wary of permitting immigration courts to undertake *de novo* factual inquiries, under the "clear and convincing evidence" standard, into facts merely "relevant to," or "tethered to," an alien's prior conviction. I would permit immigration courts to look to the record of conviction, but only to establish "that a prior conviction 'necessarily' involved ([or] a prior plea necessarily admitted) facts equating to [the generic offense in the INA statute]." *Shepard*, 544 U.S. at 24, 125 S.Ct. 1254. *See also Dulal-Whiteway*, 501 F.3d at 128 ("while the issue of statute divisibility and reliance upon the record of conviction are theoretically separable, in practice they demand a single inquiry: has an alien been actually and necessarily convicted of a removable offense?"); *Li*, 389 F.3d at 895-98. The "necessarily" pleaded or convicted requirement explains and defines the "record of conviction" inquiry: once the court determines that the statute of conviction proscribes both conduct that would constitute an "aggravated felony" and conduct that would not, the court consults the record of conviction to determine the type of conduct the conviction necessarily includes. *Dulal-Whiteway*, 501 F.3d at 131; *Li*, 389 F.3d at 895-96.

In this case, loss was not an element of the crime of conviction. The conspiracy count of the indictment did assert a fraudulent scheme to obtain "hundreds of millions of dollars" in loans from major banks, but the Court in petitioner's criminal trial instructed the jury that it need not find any loss in order to convict. A.R. at

150, 156, 158. We thus know that despite the averment of the indictment, the jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss. The BIA and our Court acknowledge as much. As a result, they point not to the indictment and verdict to support their conclusion, but rather the record of the subsequent sentencing proceedings. Specifically, they focus attention on (1) the sentencing judge's order that all defendants be jointly and severally liable for restitution in excess of $10,000; and (2) the petitioner's stipulation with the government that a correct application of the U.S. Sentencing Guideline to petitioner's convictions on Counts 1 (conspiracy to commit fraud) and 30 (conspiracy to commit money laundering) produced a base offense level of 38, an offense level including an enhancement "[b]ecause the loss from the offense exceeds $100,000,000." A.R. at 264. Neither portion of the sentencing record, however, establishes that petitioner has been "convicted" of causing a $10,000 loss.

With respect to the sentencing judge's restitution order, I agree with the Second and Eleventh Circuits that it does not support a conclusion of removability. As the *Dulal-Whiteway* Court put it in the context of a guilty plea case:

> The restitution set by a judge is based on a loss amount established by a preponderance of the evidence and need not be tied to the facts admitted by defendant's plea. . . .

> In other words, the amount of the restitution is not constrained by facts upon which the plea "necessarily" rested.

Dulal-Whiteway, 501 F.3d at 130. *See also Obasohan v. Attorney General*, 479 F.3d 785 (11th Cir.2007) ("[W]hile a sentencing court in the criminal context may order restitution not only for *convicted* conduct but also for a broad range of *relevant* conduct, the plain language of the INA requires that an alien have been *convicted of* an aggravated felony to be removable."). I also agree with those courts that a contrary conclusion would put one facing removal and lifetime exclusion in a difficult and unfair position.

> We note that if the immigration court were authorized to base a finding of an aggravated felony on conduct and victim losses that were not charged, proven or admitted, it would be impossible for a criminal defendant to evaluate the immigration consequences of a guilty plea at the time of entering that plea, because those consequences would be known only at the time of sentencing. Where loss amounts are charged and proven or admitted, however . . . no such concern arises.

Obasohan, 479 at 791, n. 12.

For much the same reasons, I would reach the same conclusion with respect to the propriety of the BIA

consulting the sentencing stipulation of the parties in this case. The stipulation with respect to the application of the Sentencing Guidelines in this case is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.[16]

It is true, as the Court stresses, that retention of the convicted conduct requirement will result in the BIA being able to remove fewer aliens on the ground that they have been convicted of an aggravated felony. I do not find that problematic because that appears consistent with the Congressional intent reflected in 8 U.S.C. § 1227(a)(2)(A)(iii). If there is a problem, however, I would reserve it for legislative correction. Furthermore, the modified categorical approach does not, as the Court suggests, elevate the government's burden of proof in immigration cases from "clear and convincing evidence" to "beyond a reasonable doubt."

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16. The Court suggests that neither petitioner's sentencing stipulation nor the sentencing court's restitution order involved consideration of relevant conduct. It fails to explain, however, how it knows this to be true. The stipulation was solely for the purpose of a guideline regime that requires consideration of losses from relevant as well as convicted conduct and, there being no limitation to the later, the stipulation clearly applied to both. *See* U.S.S.G. § 1B1.3, Application Notes 1-2. The restitution regime, like the Guidelines, also allows the Court to consider losses from relevant conduct, and nothing I have found in the record suggests that petitioner's sentencing court focused on the distinction.

It merely requires the government to prove, by clear and convincing evidence, that the alien was actually "convicted" of the asserted "aggravated felony." *See Obasohan v. Attorney General*, 479 F.3d 785, 790 (11th Cir.2007) ("There was no basis in this record from which the IJ could have found by 'clear, unequivocal and convincing' evidence that the restitution order was based on convicted or admitted conduct.").

This Court has never before found an alien deportable for conduct the alien was neither convicted of nor pled guilty to; the Court's approach, therefore, will significantly expand the reach of the INA's "aggravated felony" provisions in this Circuit. As the Court emphasizes, in *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir.2004), we reviewed our "aggravated felony" jurisprudence and concluded that we had failed to follow the "formal" categorical approach in three cases, all of which applied § 1101(a)(43)(M)(i).[17] That provision, the Court stated, "begs an adjudicator to examine the facts at issue." *Id.* at 161. *Singh* did not explain precisely which facts were "at issue." However, it suggested a "further inquiry" much like the one I would adopt. *Singh* was decided prior to the Supreme Court's opinion in *Shepard*, and the Court reviewed our prior case law only to determine when we had applied the "formal"

17. *Singh* itself merely held that, when applying a different "aggravated felony" definition, "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), this Court *should* follow the strict categorical approach. *Singh*, 383 F.3d at 163-64.

version of the categorical approach described in *Taylor*. As the *Singh* Court explained,

> "[u]nder that approach, an adjudicator 'must look only to the statutory definitions of the prior offenses,' and may not 'consider other evidence concerning the defendant's prior crimes,' including, 'the particular facts underlying [a] conviction."

Singh, 383 F.3d at 148 (quoting *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143). That "formal" approach is essentially the first step of the two-step inquiry of the Courts of Appeals for the Second and Ninth Circuits. The *Singh* Court concluded that "a departure from the formal categorical approach seems warranted when the terms of the [INA's definition of an "aggravated felony"] invite inquiry into the *facts underlying the conviction*," *Singh*, 383 F.3d at 148 (emphasis added), and that § 1101(a)(43)(M)(i) is such a statute. *Singh* did not, however, suggest divorcing the § 1101(a)(43)(M)(i) "qualifier" from the INA's conviction requirement entirely.[18] The Supreme Court offered further guidance

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18. *Singh* recognized that either (1) a statute of conviction containing a disjunctive element under which one part of the disjunctive would render the alien removable and one would not, a statute it termed "divisible," or (2) an element of the "generic" definition of the prior offense designated by the INA as an "aggravated felony," might force an IJ to look beyond the "formal" categorical approach. However, I do not read *Singh* to say that the former situation invokes *Taylor* and *Shepard*, while

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on the categorical approach in *Shepard*, less than a year after we decided *Singh*. *Shepard* reemphasized that the inquiry is not limited to a formal comparison of statutory elements but rather should focus on identifying the facts upon which the prior conviction "necessarily" rested.[19]

(Cont'd)

the latter authorizes the IJ to undertake a broad factual inquiry. *Singh* simply recognized that both are instances where the statute of conviction sweeps more broadly than the INA's definition. A statute of conviction containing a disjunctive element under which one part of the disjunctive would render the alien removable and one would not is "divisible," and similarly a statute of conviction containing no loss element is "divisible" under § 1101(a)(43)(M)(i) into (1) convictions for aggravated felonies where the loss is more than $10,000 and (2) other convictions where it is less than $10,000. In either instance, the nature of the inquiry does not change. The Second Circuit properly interpreted *Singh* in this manner. *Dulal-Whiteway*, 501 F.3d at 127-28.

19. *Shepard* held that a guilty plea constitutes a "conviction," and that a reviewing court may look to a "transcript of plea colloquy or [the] written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea," to determine precisely what conduct the defendant pled guilty to. *Shepard*, 544 U.S. at 20, 125 S.Ct. 1254. In so doing the Court reemphasized that, when the conviction resulted from a jury verdict, the Court is not limited to a comparison of the statutory elements-the "formal" version of the categorical approach upon which *Taylor* had largely focused—but also may undertake an analogous inquiry, looking to "charging documents[ ] and jury instructions to determine whether an earlier conviction after trial was for [the generic enumerated offense]." *Shepard*, 544 U.S. at 16, 125

(Cont'd)

Singh's conclusion that § 1101(a)(43)(M)(i) invites further inquiry beyond the formal approach in order to determine "the facts underlying the conviction" is entirely consistent with *Shepard's* admonition to focus on the facts "a prior conviction 'necessarily' involved." *Shepard*, 544 U.S. at 24, 125 S.Ct. 1254. And, those inquiries are essentially the "modified" or second step of the categorical approach of the Courts of Appeals for the Second and Ninth Circuits.

Our opinion in *Munroe v. Ashcroft*, 353 F.3d 225, 227 (3d Cir.2003), also did not abandon the INA's conviction requirement for the § 1101(a)(43)(M)(i) loss element. In *Munroe*, we merely held that an immigration court should not rely on the restitution order to establish the loss when the convicting court's original restitution order had been based on the convicted loss, but the court subsequently reduced the restitution from just above, to just below, $10,000 only to affect subsequent deportation proceedings. *Munroe*, 353 F.3d at 227. We emphasized that the alien had pled guilty to two counts in the indictment, each of which specified a precise loss amount, and we concluded:

> "We agree . . . that the amount of loss involved in that conviction was greater than $10,000. The indictment alleged that the loss exceeded

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S.Ct. 1254. In either instance, the inquiry is to determine whether the conviction "had 'necessarily' rested on the fact identifying the [prior crime] as [the enumerated offense]." *Id.* at 21, 125 S.Ct. 1254.

> this amount, and Munroe does not claim that, when he pled guilty, he admitted to a lesser loss."

Id. This holding is based on a convicted loss amount (admitted in the plea agreement) and is therefore entirely consistent with cases such as *Shepard* and *Dulal-Whiteway*.[20]

Our opinion in *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir.2006), is also consistent with this approach.[21] *Alaka* stated that "the formal categorical approach properly may be abandoned . . . when the terms of the statute on which removal is based invite inquiry into the facts of the underlying conviction," *id.*, and that (M)(i) "invites further inquiry." *Id.* However, much like *Singh*, *Alaka* stated that the "further inquiry" is to

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20. Although the *Munroe* Court opined that, in different circumstances, the amount of restitution ordered "may be helpful" to determine the loss amount, *id.*, I do not find that *dicta* controlling in this case. The Court's holding was that the restitution order should *not* have been relied upon in that case. I interpret the Court's statement as merely declining to adopt any broad-based rule regarding restitution orders and instead limiting the Court's holding to the (somewhat unusual) facts of that case.

21. As the Court emphasizes, *Alaka* simply held that, if an alien pleads guilty to one count in an indictment, he or she cannot be deported for conduct alleged in a different, unpled and unconvicted count of the indictment. *Id.* at 106. However, *Alaka's* reasoning supports the approach I would adopt.

identify "the facts underlying the conviction," *id.*, and the Court further explained that "[a] focus on the conduct that resulted in a conviction is thus our analytical starting point." *Id.* at 107. Indeed, *Alaka* expressly rejects reliance upon "relevant" but unconvicted losses calculated for sentencing purposes; to do so, the Court explained, "would divorce the $10,000 loss requirement from the conviction requirement . . . because relevant conduct for sentencing purposes need not be admitted, charged in the indictment or proven to a jury." *Id.* at 108 (internal quotation marks and citations omitted). That is precisely what the Court's approach does: the Court finds that the § 1227 conviction requirement applies to the "fraud or deceit" component of § 1101(a)(43)(M)(i), but that the loss element is merely a "qualifier" not subject to that conviction requirement, thus divorcing the two.[22]

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22. Although *Alaka* did state that the IJ could consider factual findings in the sentencing report, *id.* at 105, I would not rely on that *dicta* because to do so here would be contrary to *Alaka's* clear rationale. *Alaka* does not explain precisely when a court may look to facts found in a sentencing report, but the Court's holding did not rely on any such facts: the Court emphasized that, "as was the case with *Knutsen* and *Chang*, *Alaka* unmistakably pled guilty to one count, and the plea agreement plainly documented that loss at less than $10,000." *Alaka*, 456 F.3d at 108.

Alaka's reference to the sentence may have been a recognition that, for "aggravated felonies" other than the one at issue in this case, the INA expressly directs courts to look to the sentence, and therefore a *per se* rule that courts can never

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Because I would join those Courts of Appeals which require that removability under § 1227 and § 1101(a)(43)(M)(i) be predicated on convicted conduct, and because the record does not demonstrate that petitioner was actually and necessarily convicted of any particular loss, I would grant the petition for review.

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look to facts found in a sentencing report is certainly not appropriate. *See Singh*, 383 F.3d at 162 (8 U.S.C. § 1101(a)(43)(G) directs courts to look to the sentence actually imposed because that definition states "a theft offense . . . for which the term of imprisonment *[imposed is] at least one year*," whereas other § 1101(a)(43) definitions include the qualifier "for which a sentence of one year imprisonment or more *may be imposed*") (bracketed text in original; emphasis added).

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED AUGUST 8, 2006

Decision of Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A39 075 734 - York

In re: MANOJ *NIJHAWAN*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(D)

Appendix B

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(M)

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(U)

APPLICATION: Termination

The respondent has appealed the February 22, 2006, decision of an Immigration Judge which found him removable as an alien convicted of aggravated felonies, and ordered him removed to India. The Department of Homeland Security (DHS) has not responded. We will affirm the decision of the Immigration Judge insofar as he found the respondent removable as an alien convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and (U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), (U). The request for oral argument is denied.

On August 25, 2004, the respondent was found guilty in the United States District Court, Southern District of New York, for conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. § 371, and for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). He was sentenced to 41 months of incarceration, and ordered to pay $683,632,800.23 in restitution, jointly and severally.

Appendix B

The respondent was charged with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who committed an aggravated felony as defined in sections 101(a)(43)(D), (M)(i), and (U) of the Act.[1]

The respondent made a motion to terminate the proceedings before the Immigration Judge, and argued that his convictions were not aggravated felonies for various reasons. The DHS opposed the motion in a detailed response. In an interim order dated February 8, 2006, the Immigration Judge denied the motion to terminate and found that DHS met its burden to show removability. He incorporated this decision into an order dated February 22, 2006, noted that the respondent was not seeking any form of relief from removal, and ordered him removed to India. The respondent has filed this appeal, which largely reiterates the arguments he presented below. We will affirm the Immigration Judge's decision insofar as he found the respondent removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and (U) of the Act.

Section 101(a)(43)(M)(i) defines an aggravated felony as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Subsection (U) defines an aggravated felony as "an attempt or conspiracy to commit an offense described in this paragraph." These charges were premised on

1. The respondent was also charged with removability for a conviction for a crime involving moral turpitude. This charge was not sustained.

the respondent's conviction under 18 U.S.C. § 371, for conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. §§ 1344, 1341, 1343.

On appeal, the respondent argues that his conspiracy crime can only be an aggravated felony if the underlying crimes have the elements of common law fraud. We disagree, and point out that section 101(a)(43)(M)(i) of the Act only requires that the offense "involves" fraud or deceit. *See Valansi v. Ashcroft*, 278 F.3d 203, 209-210 (3d Cir. 2002) (section 101(a)(43)(M) does not require that the elements of the underlying criminal offense be coexistive with the crime of fraud; the word "involves" expands the scope of the ground to include offenses that have, at least as one element, fraud or deceit). The respondent's conviction clearly fits this ground. For example, the respondent was charged with conspiracy to violate 18 U.S.C. § 1344. This crime punishes one who "knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." Both sections of this crime clearly involve "fraud," and we have no hesitation finding that it falls under section 101(a)(43)(M)(i) of the Act. *See also Alaka v. Attorney General*, __ F.3d __, 2006 WL 1994500, *13 (3d Cir. July 18, 2006).

Appendix B

We next determine whether the respondent's crime involved a loss to the victim which exceeded $10,000. The respondent argues that his crime cannot be an aggravated felony because there is no element in the underlying fraud crimes which requires a specific monetary loss. We agree with the respondent's contention that the $10,000 loss threshold is not a necessary element of the offense in this case, as no loss of any kind is required to sustain a conviction under the federal criminal statutes at issue. However, the $10,000 loss threshold need not be an element of the statutory offense in order for the conviction to constitute an aggravated felony under section 101(a)(43)(M)(i) of the Act. Its employment within the aggravated felony section of the Act signals that it was not to be an element of the crime. Instead, it is used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of section 101(a)(43) of the Act, such as the 1-year sentence requirement found in subsections 101(a)(43)(F), (G), and (J). *See Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004) (observing that an enumerating statute specifying that a crime be committed "within the last two years" "could not be read to cover only crimes which have 'within the last two years' as an element; instead, a court would read 'within the last two years' as a limiting provision on crimes that would otherwise qualify"). Furthermore, Congress could not reasonably have intended it to be an element of the crime, given the breadth of the federal and state fraud statutes. To read the $10,000 loss requirement as a necessary element of the crime would virtually negate the fraud ground.

Appendix B

To determine whether the respondent's particular offense will sustain a ground of removability under the Act as an aggravated felony in this case, we look not only to the statutory provision under which an alien has been convicted, but also to the record of conviction - meaning the indictment, plea, verdict, and sentence - and to other documents admissible as evidence in proving a criminal conviction. *See Alaka v. Attorney General, supra,* at *13 (internal cites omitted);[2] *Singh v. Ashcroft, supra,* at 161 (noting that the qualifying requirement of section 101(a)(43)(M)(i) of the Act that "the loss to the victim or victims exceeds $10,000" is "the prototypical example" of a situation where a departure from the formal categorical approach is warranted in order to look at the facts underlying the conviction).

The respondent was convicted on Count 1 of his indictment, relating to the conspiracy charge, after a jury trial. Upon reviewing the transcript of the jury instructions, and the other conviction documents, it is not apparent that the jury explicitly found that the respondent's crime involved any specific monetary amount. *See Li v. Ashcroft,* 389 F.3d 892, 898-99 (9th Cir. 2004). We therefore will look beyond the finding of guilty to determine the amount of loss in this case. *Cf. Alaka v. Attorney General, supra,* *14 (holding that

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2. We note that in *Alaka, supra,* the Court of Appeals cites to *Shepard v. United States,* 544 U.S. 13, 16 (2005). This undermines the respondent's argument on appeal that *Shepard* would cause the Court of Appeals to rethink any earlier holding indicating that any assessment of loss can go beyond the elements of the underlying crime.

where the plea agreement establishes the offense for which the respondent will be convicted, and it indicates a monetary amount, it is that agreement, and not the indictment or the sentence, that should be looked at in determining the intended loss).[3]

The respondent entered into a stipulation of facts before he was sentenced by the criminal judge. Within, he acknowledged that the loss from his crimes exceeded $100,000,000 (*see* August 18, 2004, Agreement, p. 3).[4] The stipulated facts were relied upon at sentencing, and the criminal judge imposed restitution, jointly and severally, in the amount of $683,632,800.23 (*see* Respondent's Brief in Support of Motion to Terminate, Exh. B, at pgs., 8, 16). The judgment of conviction also specifically states that the "loss" involved in the respondent's case is $683,632,800.23. *See* judgment, page 5. This evidence is sufficient to establish that the respondent's conviction renders him removable under the grounds at issue.[5] *Cf. Munroe v. Ashcroft*, 353

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3. In *Alaka v. Attorney General, supra*, the respondent pled guilty to a charge which stated that the loss to the particular victim was just over $4,000. The Court of Appeals found that the Immigration Judge erred in relying on a sentencing document which found that the intended loss for the crime was $47,969.

4. Although admitted as evidence, the Immigration Judge failed to mark this document and others with exhibit numbers.

5. We note that the conspiracy charge implies that the underlying crimes might not have been completed, but the

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F.3d 225, 227 (3d Cir. 2003). We therefore uphold the Immigration Judge's decision insofar as he found the respondent removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and (U) of the Act. We accordingly need not address whether the respondent is removable for an aggravated felony under section 101(a)(43)(D) of the Act. An appropriate order will be entered.

ORDER: The finding of the Immigration Judge that the respondent is removable under section 237(a)(2)(A)(iii) of the Act, through sections 101(a)(43)(M)(i) and (U) of the Act, is affirmed.

s/ Lauri S. Filppu
FOR THE BOARD

(Cont'd)

charging and sentencing documents indicate an actual loss to the victims in this case. In any event, we note that section 101(a)(43)(U) does not require that the victim suffer an actual loss which exceeds $10,000. *See Matter of Onyida*, 22 I&N Doc. 552 (BIA 1999).

APPENDIX C — ORDER OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT, ALLENWOOD, PENNSYLVANIA DATED MARCH 24, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
ALLENWOOD, PENNSYLVANIA

File No.: A 39-075-734
IN REMOVAL PROCEEDINGS

In the matter of:
NIJHAWAN, MANOJ

Respondent

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on February 22, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

(✓) The respondent was ordered removed from the United States to India or in the alternative to _____.

* * *

Appendix C

Hearing conducted by: Video Conference

Appeal: RESERVED

APPEAL DUE BY: March 24, 2006

s/ Walter A. Durling
Walter A. Durling
Immigration Judge

APPENDIX D — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, YORK, PENNSYLVANIA DATED FEBRUARY 22, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

February 22, 2006

File No.: A 39 075 734

IN REMOVAL PROCEEDINGS

In the Matter of

MANOJ NIJHAWAN

Respondent

CHARGE: 237 (a) (A) (ii), 237 (a) (A) (iii).

APPLICATION: Termination.

ON BEHALF OF RESPONDENT:

Thomas E. Moseley, Esquire

ON BEHALF OF DHS:

Maureen Gaffney
Assistant Chief Counsel

Appendix D

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 46-year-old married male alien, a native and citizen of India. He entered the United States as an immigrant in July of 1985. He was placed into removal proceedings on or about September 7, 2005, with the issuance of a Notice to Appear Form I-862. Respondent conceded allegations no. 1 through no. 5. He denied the grounds of removal as set forth against him and requested termination.

In an interlocutory ruling on motion to terminate, which is appended to the record and dated February 8, 2006, the Court determined the aggravated felony grounds of removal as charged against respondent, as set forth on the Notice to Appear, were valid and thus the Government has met its burden of proof by clear and convincing evidence. The reasons set forth for the Court's findings in this regard, or as set forth in the interlocutory ruling, will not be repeated here.

As respondent is not seeking any other relief to avoid removal, the following order is hereby entered.

ORDER

Respondent is hereby ordered removed from the United States to India pursuant to the grounds of removal as set forth in his Notice to Appear.

s/ Walter A. Durling
WALTER A. DURLING
Immigration Judge

APPENDIX E — INTERLOCUTORY RULING ON MOTION TO TERMINATE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, YORK PENNSYLVANIA DATED FEBRUARY 8, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN REMOVAL PROCEEDINGS

File # A 39 075 734

IN THE MATTER OF:

NIJHAWAN, Manoj

Respondent.

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esq.

ON BEHALF OF DHS:
Jeffrey Bubier, Esq.

Appendix E

INTERLOCUTORY RULING ON MOTION TO TERMINATE

Respondent, through counsel, has submitted a pre-trial brief in support of his motion to terminate proceedings. The DHS has submitted, through its attorney, a brief in opposition to termination. Both briefs have been duly considered. Respectfully, the court disagrees with respondent and concurs with DHS counsel that respondent's conviction for conspiracy to money laundering was in an amount exceeding $10,000., the threshold amount set forth in the aggravated felony definitions at INA §§ 101(a)(43)(D). The court further agrees that respondent's conviction for conspiracy to commit bank, mail, and wire fraud, a violation of INA § 101(a)(43)(M)(i) and (U), is also an aggravated felony.

In this regard, it is first presumed that the indictment appended to the record at Tab F of DHS evidence is the same "superseding indictment" upon which respondent was found guilty by jury trial as reflected in the Judgment at Tab B of DHS evidence, and as further referenced in the post-trial "sentencing stipulation" appended to the record at Tab G. For purposes of examining this record to determine whether the government has met its burden of proof by clear and convincing evidence, INA § 240(o)(3)(A), respondent was convicted under Counts 1 and 30 of the indictment, with conspiracy to money laundering being the primary or more serious criminal scheme, and conspiracy to commit bank, mail, and wire fraud being the conduit upon which the illegal enterprise was based.

Appendix E

Importantly, it is divined that Count 30 (conspiracy to money laundering) is directly premised on Count 1 (conspiracy to commit bank fraud, mail fraud, and wire fraud). Both the district court's jury charge, Tab A, paragraphs 3018-3032 of respondent's evidence, and page 2 of Tab G[1] of DHS evidence, make this clear. For purposes of ascertaining the extent of respondent's conviction *vis-a-vis* INA § 101(a)(43)(D), the court must engage in a *modified* categorical approach. This is because, as respondent accurately points out in his brief, the federal money laundering statute does not delineate any specific monetary amount of proceeds upon which a conviction must be based. For that matter, neither does Title 18 U.S.C. § 371. Indeed, the district court's extensive jury charge mentions no specific monetary amount in order to adjudge guilt.

On the other hand, DHS counsel is quite correct in observing that 18 U.S.C. § 1956(h), the federal statute under which respondent was adjudged guilty, is "an offense described in section 1956 of Title 18 . . ." as set forth in INA § 101(a)(43)(D). Thus, since no specific monetary amount is required under section 1956 to obtain a conviction, the DHS must establish that the $10,000. threshold amount set forth in the aggravated felony provision has been met in this case. And the only way this court can make that assessment is to examine the entire criminal record, which in this case includes the indictment. This is where, as needed, a *modified* categorical approach may be undertaken. *Singh v.*

1. Specifically, under paragraph entitled "Offense Level", ¶ 2.

Ashcroft, 383 F.3d 144, 161 (3rd Cir. 2004). In this regard, unlike those instances where a defendant enters a guilty plea, which may or may not conform in all particular regards to the indictment,[2] it must be presumed, absent evidence to the contrary, that a jury's findings conform in all respects to the specific allegations set forth under those counts of the indictment upon which a finding of guilt is made. "Evidence to the contrary" is a burden, of course, which lies with the alien in the form of rebuttal evidence.

A review of the indictment, as DHS counsel aptly points out, Count 1, ¶ 36, does make reference to the following:

> "Since at least on or about 1998, through on or about May 14, 2002, Manoj Nijhawan . . . the defendants . . . and co-conspirators . . . engaged in a fraudulent scheme to obtain *hundreds of millions of dollars* in loans from numerous major banks . . . As part of the scheme, the defendants and their co-conspirators fraudulently induced the Victim Banks to issue a number of loans through an elaborate series of misrepresentations. . . ."

(Emphasis added).

The court concurs with DHS counsel in this particular regard that the indictment itself makes

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2. *Valansi v. Ashcroft*, 278 F.3d 203, 214 (3d Cir. 2002).

reference, *albeit* in general terms, to the amount of monies to which this respondent, through his co-conspiratorial endeavors, participated with several others in their unified fraudulent schemes to engage in money laundering. The term *hundreds of millions of dollars*, however, is sufficiently specific to denote an amount of U.S. currency for exceeding the threshold amount of $10,000. as set forth in INA § 101(a)(43)(D). Again, while no specific reference to amount of monies is enumerated in Count 30 as it relates to conspiracy to money laundering, that count is directly premised upon Count 1. That is, Count 30 is incorporated by reference in the indictment to the facts and allegations set forth in Count 1. When read together, the court is satisfied that the government has met its burden of proof as set forth above to establish a removable offense.

By the very same token, the DHS has met its burden of proof as pertaining to the grounds of removal at INA § 101(a)(43)(M)(i) and (U). Indeed, the only issue in this case as pertaining to the specific grounds of removal is the issue of the threshold monetary amounts set forth in the two substantive charges. The singular reference to "hundreds of millions of dollars" under Count 1 is clearly indicative of the vast amounts of ill gotten gains at the heart of respondent's criminal trial, and the repeated references in that count to fraud also brings the conviction well within the proscriptions of INA § 101(a)(43)(M)(i) as reflecting the loss or attempted loss. Since respondent's conviction entailed conspiracy under Count 1, INA § 101(a)(43)(U) was appropriately charged and has been sustained.

Appendix E

s/ Walter A. Durling
Walter A. Durling
Immigration Judge

February 8, 2006

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 17, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3948

MANOJ NIJHAWAN,

Petitioner

v.

ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent

Petition for Review of an Order of the
United States Department of Justice
Board of Immigration Appeals
(BIA No. A39 075 734)
Immigration Judge: Walter A. Durling

Appendix F

Present: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, HARDIMAN,
STAPLETON,* *Circuit Judges*
and IRENAS,** *District Judge*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Judge Ambro would have granted rehearing.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: July 17, 2008

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* The vote of the Honorable Walter K. Stapleton, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

** The vote of the Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey, is limited to panel rehearing only.

OPPOSITION BRIEF

No. 08-495

In the Supreme Court of the United States

MANOJ NIJHAWAN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million.

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In the Supreme Court of the United States

No. 08-495

MANOJ NIJHAWAN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 523 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 44a-51a) and the immigration judge (Pet. App. 54a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2008. A petition for rehearing was denied on July 17, 2008 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on October 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of India who entered the United States as an immigrant in July 1985. Pet. App. 55a. In 2002, petitioner was arrested and in-

dicted for his involvement in a fraudulent scheme to obtain "hundreds of millions of dollars" in loans from banks. *Id.* at 2a (internal quotation marks and citation omitted); see A.R. 283. After a jury trial, petitioner was convicted of conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. 371, and of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 2a-3a, 45a.

The federal bank fraud, mail fraud, and wire fraud statutes do not require proof of any particular amount of loss to the victim or victims, see 18 U.S.C. 1344; 18 U.S.C. 1341; 18 U.S.C. 1343, and the jury did not find any particular amount of loss in reaching its verdict, see Pet. App. 3a. For purposes of sentencing, however, petitioner stipulated that the loss from the fraud conspiracy offense "exceeds $100 million." A.R. 264; see Pet. App. 3a. The judgment of conviction indicated that the total loss associated with the offenses was $683,632,800.23. A.R. 281; see Pet. App. 3a. Petitioner was sentenced to 41 months of imprisonment and ordered, jointly and severally with his co-defendants, to pay restitution in the amount of the loss. A.R. 281-282; see Pet. App. 3a, 45a.

2. While petitioner was serving his sentence, the Department of Homeland Security (DHS) instituted removal proceedings against him. Pet. App. 3a. DHS alleged that petitioner was removable for, *inter alia*, having been convicted of offenses that qualify as "aggravated felon[ies]," namely, a money laundering offense in violation of 18 U.S.C. 1956 in which the amount of the funds exceeded $10,000, see 8 U.S.C. 1101(a)(43)(D), and an offense involving fraud or deceit in which the loss to the victim or victims exceeded $10,000, see 8 U.S.C. 1101(a)(43)(M)(i). See 8 U.S.C. 1227(a)(2)(A)(iii) (providing that an alien who commits an aggravated felony is

removable); 8 U.S.C. 1101(a)(43)(U) (providing that conspiracy to commit an offense described in 8 U.S.C. 1101(a)(43) qualifies as an aggravated felony). Contesting his removability, petitioner filed a motion to terminate the proceedings. Pet. App. 46a. The immigration judge (IJ) denied petitioner's motion to terminate, concluding that both of petitioner's offenses qualified as aggravated felonies and thus supported the charges of removability. *Id.* at 56a-61a. The IJ subsequently ordered petitioner removed to India. *Id.* at 54a-55a.

3. The Board of Immigration Appeals (BIA) affirmed, based solely on the charge that petitioner had been convicted of an aggravated felony fraud offense as defined in Section 1101(a)(43)(M)(i). Pet. App. 44a-51a. As an initial matter, the BIA concluded that petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualified as a crime involving fraud or deceit. *Id.* at 47a. The BIA also concluded, based on the record evidence, that petitioner's conviction was for an offense "in which the loss to the victim or victims exceed[ed] $10,000," 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 47a-50a. The BIA rejected petitioner's argument that his fraud conspiracy conviction did not qualify as a conviction for an aggravated felony because the jury was not required to find loss exceeding $10,000, reasoning that the loss threshold language is "used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of [Section 1101(a)(43)]." *Id.* at 48a. The BIA also noted that, "given the breadth of the federal and state fraud statutes," "[t]o read the $10,000 loss requirement as a necessary element of the crime would virtually negate the fraud ground" of removability; Congress, the BIA concluded, "could not reasonably have intended" such a result.

Ibid. Looking to petitioner's sentencing stipulation that the loss exceeded $100 million, as well as the judgment of conviction indicating that the loss involved was more than $680 million, the BIA concluded that petitioner had been convicted of an aggravated felony under Section 1101(a)(43)(M)(i). *Id.* at 50a-51a.

4. The court of appeals affirmed. Pet. App. 1a-43a. The court agreed with the BIA that petitioner's fraud conspiracy conviction was for an offense that "involve[d] fraud," *id.* at 5a-7a, and that, because petitioner's indictment, sentencing stipulation, judgment of conviction, and restitution order clearly established that "the loss to the victim or victims exceed[ed] $10,000," the offense qualified as an aggravated felony under Section 1101(a)(43)(M)(i), *id.* at 7a-26a.

The court of appeals rejected petitioner's argument that, under this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), the determination whether his fraud offense involved the requisite loss must be limited to those facts necessarily found by a jury or necessarily admitted by a defendant entering a guilty plea. Pet. App. 9a-26a. The court explained that those decisions, which concerned whether prior state burglary convictions qualified as convictions for "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), answered the question by employing a "formal categorical approach," under which a sentencing court examines only the statutory definition of the offense to determine whether it contains the elements of generic "burglary" under the ACCA, and a "modified" version of that approach, which looks to other documents to determine "the nature of the conviction itself and those elements that the jury necessarily found." Pet. App. 9a-

12a. In this case, the court of appeals explained, the loss language of Section 1101(a)(43)(M)(i) does not describe a required element of a generic offense, but is, rather, "qualifying" language, *id.* at 8a, that serves as "a limiting provision on crimes that would otherwise qualify," and "invite[s] inquiry into the facts underlying the conviction at issue," *id.* at 12a-13a (quoting *Singh* v. *Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004)). The court concluded that Section 1101(a)(43)(M)(i) thus requires an inquiry into whether the record evidence establishes a loss exceeding $10,000, and whether the loss was "particularly tethered" to the specific fraud offense alleged to be an aggravated felony. *Id.* at 16a (quoting *Knutsen* v. *Gonzales*, 429 F.3d 733, 739-740 (7th Cir. 2005); see *id.* at 26a.

The court of appeals noted that a contrary rule would effectively raise the government's burden in removal proceedings from one of providing "clear and convincing evidence" of an alien's removability, see 8 U.S.C. 1229a(c)(3)(A), to one of "proof beyond a reasonable doubt." Pet. App. 24a. Moreover, the court noted, because "[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element," such a rule "would render § 1101(a)(43)(M)(i) largely inoperative, for rarely will a defendant be convicted of a fraud offense with loss as an element found by the jury or explicitly admitted to in a guilty plea." *Id.* at 25a. Finally, the court concluded, such a rule is unjustified by practical considerations concerning ease of proof, since "[i]t is well within the competence of a court to examine the record for clear and convincing evidence of loss caused by the conduct of conviction." *Id.* at 26a.

Judge Stapleton dissented. Pet. App. 27a-43a. In his view, Section 1227(a)(2)(A)(iii), which requires that an

alien have been "convicted" of an "aggravated felony," "requires a comparison of the *prior conviction* to the generic definition of the pertinent aggravated felony—in this case, §§ 1101(a)(43)(M)(i) and (U)." *Id.* at 29a. That inquiry, Judge Stapleton concluded, must be limited to an examination of "the facts upon which the petitioner's prior conviction actually and necessarily rested." *Id.* at 28a; see *id.* at 29a, 33a, 43a. Because, "[i]n this case, loss was not an element of the crime of conviction," and the jury was therefore not required to find any particular loss in order to convict, Judge Stapleton concluded that petitioner's fraud offense did not qualify as an "aggravated felony" under Section 1101(a)(43)(M)(i). *Id.* at 33a.

ARGUMENT

Petitioner renews his contention (Pet. 14-26) that his conviction for involvement in a multi-million-dollar fraud conspiracy does not qualify as a conviction for an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U), because the jury was not required to find a particular amount of loss in order to convict. The court of appeals correctly rejected petitioner's contention, and although its analysis diverges from decisions of other courts of appeals, a recent decision of the Board of Immigration Appeals may serve as a vehicle for resolving any disagreement among the courts of appeals as to the question presented. Further review is not warranted.

1. The court of appeals correctly held that petitioner was convicted of an offense that qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (U), because petitioner was convicted of conspiracy to com-

mit an offense that "involves fraud," and because petitioner's sentencing stipulation, criminal judgment, and restitution order clearly established that petitioner's fraud offense was one "in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(i). See Pet. App. 7a-26a.

a. Petitioner contends (Pet. 17-24) that, in determining whether the loss requirement was satisfied, the court of appeals should have restricted its inquiry "at most[] to what was necessarily established in the adjudication of guilt," consistent with the "categorical approach" set forth in this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005). Petitioner's contention lacks merit.

As the court of appeals explained (Pet. App. 9a-12a), the categorical approach of *Taylor* and *Shepard* governs the range of documents that may be used to establish that a defendant's prior conviction categorically qualifies as a predicate for a criminal sentencing enhancement, based on an examination of the statutory elements of the defendant's offense. See *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 16, 26. Neither case involved removal proceedings, and neither decision purported to limit the kinds of evidence that the government may adduce to establish required features of a prior offense other than its elements.

In a removal proceeding involving charges under Section 1101(a)(43)(M)(i), the specificity of the loss requirement language makes clear that loss exceeding $10,000 is not a required element of the offense of conviction, but is rather "qualifying" language used to identify a subset of fraud offenses that constitute aggravated felonies, Pet. App. 8a, 14a, and therefore "invites inquiry

into 'the underlying facts of the case,'" *id.* at 12a (quoting *Singh* v. *Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004)). As the court of appeals noted, a contrary interpretation "would render § 1101(a)(43)(M)(i) largely inoperative," since "[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element" that must be "found by the jury or explicitly admitted to in a guilty plea." *Id.* at 25a. The same is true of the other prong of the definition of "aggravated felony" in Section 1101(a)(43)(M), which encompasses any offense that "is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(ii), since 26 U.S.C. 7201 likewise does not contain a revenue-loss element. See 26 U.S.C. 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony[.]"). It is unlikely that Congress intended for the loss requirements of Section 1101(a)(43)(M)(i) and (ii) virtually to nullify those provisions. Cf. *Taylor*, 495 U.S. at 594 (rejecting an interpretation of the term "burglary" in 18 U.S.C. 924(e) that would track the common-law definition, reasoning that few state burglary statutes conform to the common-law definition, and such an interpretation therefore "would come close to nullifying that term's effect in the statute").

b. Contrary to petitioner's contentions (Pet. 19-21), the court of appeals' conclusion is entirely consistent with the statute's use of the words "convicted," "that," and "in." As an initial matter, the statutory requirement that an alien be "convicted" of an aggravated felony provides little aid to petitioner, since the court of appeals held that petitioner was removable because of his crimi-

nal conviction for conspiracy to commit fraud. In concluding that petitioner had a qualifying conviction, the court examined the statutory definitions of the federal bank fraud, mail fraud, and wire fraud offenses that formed the basis for the charges against him, and concluded that those statutory definitions *categorically* describe offenses that "involve fraud or deceit," 8 U.S.C. 1101(a)(43)(M)(i). See Pet. App. 6a-7a. The court's further conclusion that, as a factual matter, the fraud offense was one "in which the loss to the victim or victims exceeds $10,000," *ibid.*, does not mean, as petitioner suggests (Pet. 18 & n.6), that the court determined that he was removable merely because he had *committed* criminal conduct. Rather, having already determined that petitioner had been convicted of an offense that categorically qualifies as an offense involving fraud or deceit, the court, consistent with the language of the statute, then inquired whether the conduct underlying that conviction resulted in victim loss greater than $10,000.

Nor does the court of appeals' decision "rip[]" the loss requirement language "out of the larger context of a restrictive clause beginning with the word 'that'" and thus "render[] 'that' a nullity." Pet. 19. The word "that," as applied to subparagraph (i) in 8 U.S.C. 1101(a)(43)(M), serves the basic function of identifying crimes "that * * * involve[] fraud or deceit." The text, beginning with "in which," then confines the qualifying fraud or deceit offenses to those resulting in a loss of $10,000 or more. The court's decision thus appropriately interprets the loss requirement language as a "limiting provision" on fraud offenses "that would otherwise qualify" as aggravated felonies under Section 1101(a)(43)(M)(i). See Pet. App. 13a (quoting *Singh*, 383 F.3d at 161).

And finally, the fact that the loss requirement is introduced by the words "in which" rather than "for which" cannot bear the significance that petitioner (Pet. 20) ascribes to it; the word "in" does suggest that the required loss must be within the scope of the criminal conduct, but that is not, as petitioner suggests, the equivalent of a requirement that the statutory definition of the offense contain a loss *element*, such that a loss finding would necessarily be part of a jury verdict or guilty plea.

c. Petitioner also errs in contending (Pet. 22) that the court of appeals' decision "radically alter[s] the burden of proof for cases such as this," because the court relied in part on a restitution order governed by a preponderance of the evidence standard. As the court repeatedly made clear, it applied the requisite "clear and convincing evidence" standard, and found such evidence in the indictment, stipulation, judgment of conviction, and the restitution order, all of which demonstrated that petitioner's fraud offense involved a loss far exceeding $10,000. Pet. App. 17a, 24a, 26a. As the court noted, there is "no argument, let alone anything in the record, that [petitioner] was convicted of an offense involving less than $10,000." *Id.* at 17a.

d. Petitioner contends (Pet. 23) that the court of appeals' approach imposes substantial added burdens on courts in removal proceedings. But it is, as the court of appeals noted, "well within the competence of a court to examine the record for clear and convincing evidence of loss caused by the conduct of conviction." Pet. App. 26a. And although petitioner cites the BIA's decision in *In re Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (1996), for the proposition that "when deportability is based upon conviction the categorical approach is the only 'workable

approach,'" Pet. 23, it is notable that the BIA itself has endorsed the approach adopted by the court of appeals. See *In re Babaisakov*, 24 I. & N. Dec. 306 (2007). Moreover, in a recent opinion, the Attorney General expressly rejected the proposition that "the administrative burdens associated with inquiries beyond the record of conviction should preclude such inquiries," noting that considerations of administrative efficiency must be "secondary to the determination and enforcement of statutory language," and that, in any event, "[i]mmigration judges are well versed in case management," and capable of avoiding "relitigat[ion] of the conviction itself." *In re Silva-Trevino*, 24 I. & N. Dec. 687, 702-703 (A.G. 2008) (internal quotation marks and citation omitted).

2. The court of appeals' decision in this case is consistent with the decisions of the First and Fifth Circuits. See *Conteh* v. *Gonzales*, 461 F.3d 45, 55, 59 (1st Cir. 2006); *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 177-179 (5th Cir. 2008). As noted above, it is also consistent with the BIA's recent precedential decision in *Babaisakov*.

In *Babaisakov*, the BIA clarified that the *Taylor* and *Shepard* categorical approach applies in immigration proceedings only insofar as the relevant statute "demands a focus exclusively on the elements of a prior conviction." 24 I. & N. Dec. at 309. Where the "removal charge requires proof of some fact that is not an element of the predicate offense," the BIA concluded that the factfinder may consider "any evidence[] otherwise admissible in removal proceedings" that bears on the question. *Id.* at 317, 320-321. Based on the language, history, and purpose of the provision, the BIA held that the loss requirement of Section 1101(a)(43)(M)(i) is such a non-element factor. *Id.* at 309-316. The BIA thus

held that a court considering whether an alien's offense qualifies as an aggravated felony under Section 1101(a)(43)(M)(i) must make two types of determinations: (1) a categorical inquiry into whether the conviction is for a crime involving fraud or deceit; and (2) an "ordinary evidentiary inquiry" into whether the loss exceeded $10,000. *Id.* at 322. In his recent decision in *Silva-Trevino*, the Attorney General expressly approved the BIA's decision in *Babaisakov*, and concluded that immigration judges may also look beyond materials qualified under *Taylor* and *Shepard* to determine whether an alien has been convicted of a "crime involving moral turpitude" under 8 U.S.C. 1182(a)(2)(A)(i)(I)). See 24 I. & N. Dec. at 701-702; see also *id.* at 689-690.

As petitioner correctly notes (Pet. 14-15), and as the court below also acknowledged (Pet. App. 9a, 21a-22a), other courts of appeals have taken different approaches to the question. See *Dulal-Whiteway* v. *DHS*, 501 F.3d 116, 131, 133-134 (2d Cir. 2007) (court must determine whether loss threshold has been met based solely on "information appearing in the record of conviction that would be permissible under the *Taylor-Shepard* approach in the sentencing context"); *Kawashima* v. *Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) (per curiam) (court may not consult any extrinsic documentation unless monetary loss is an element of the offense of conviction), petition for rehearing en banc pending, Nos. 04-74313 and 05-74408 (filed Sept. 15, 2008); cf. *Obasohan* v. *United States Att'y Gen.*, 479 F.3d 785, 790-791 (11th Cir. 2007) (restitution order did not discharge government's burden of establishing an alien's removability).

Significantly, however, both *Dulal-Whiteway* and *Obasohan* were decided before the BIA issued its precedential decision in *Babaisakov*, which is entitled to

deference under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), and neither the Second Circuit nor the Eleventh Circuit has since addressed the import of the BIA's decision in that case.[1] And although the Ninth Circuit panel's decision in *Kawashima* postdates the BIA's decision in *Babaisakov*, the panel did not address *Babaisakov* in its per curiam decision. As the Seventh Circuit recently noted, those court of appeals decisions that "predate (or do not notice) *Babaisakov* * * * require reexamination now that the [BIA] has fully developed its own position, for administrative discretion belongs to the agency rather than to the court." *Ali* v. *Mukasey*, 521 F.3d 737, 742-743 (7th Cir. 2008) (citing *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005)), petition for cert. pending, No. 08-552 (filed Oct. 23, 2008); see *id.* at 743 (deferring to the BIA's decision in *Babaisakov*). Because the BIA's

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[1] The Second Circuit has noted the conflict between its decision in *Dulal-Whiteway* and *Babaisakov*. See *Gertsenshteyn* v. *United States Dep't of Justice*, 544 F.3d 137, 144 n.7 (2d Cir. 2008); *James* v. *Mukasey*, 522 F.3d 250, 257 n.8 (2d Cir. 2008). But neither *Gertsenshteyn* nor *James* concerned the scope of evidence a court may consult in determining whether the loss threshold of Section 1101(a)(43)(M)(i) is satisfied, and neither decision addressed the question whether *Babaisakov* requires reexamination of *Dulal-Whiteway*. See *Gertshensteyn*, 544 F.3d at 145-148 (concluding that a court determining whether an offense qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(K)(ii) is limited to considering documents qualified under *Taylor* and *Shepard*); *James*, 522 F.3d at 255, 259 (noting that it remains an open question in the circuit whether the modified categorical approach applies where the alien was convicted under a "statute . . . where only one type of generic conduct . . . is proscribed, but an alien can commit the conduct both in ways that would render him removable . . . and in ways that would not"; and remanding to the BIA to consider the question in the first instance) (internal quotation marks and citation omitted).

precedential decision in *Babaisakov* may prompt other courts to reconsider their resolution of the question, and thus may alter or eliminate any differences between the courts' approaches, this Court's intervention is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys

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REPLY BRIEF

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No. 08-495

IN THE

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Attorney for Petitioner

220241

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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The government acknowledges the existence of a square conflict among the circuits on departing from the categorical approach in aggravated felony determinations under 8 U.S.C. § 1101(a)(43)(M)(i). Opp. at 11 ("As petitioner correctly notes, and as the court below also acknowledged, other courts of appeals have taken different approaches to the question."). The government nevertheless opposes certiorari on the wholly speculative ground that this conceded conflict, one that makes the Petitioner eligible for naturalization in the circuit where he was convicted but deportable in the circuit where his removal proceedings occurred, *may* resolve itself at some unspecified time in the future in light of this Court's decision in *National Cable v. Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) and the decision by the Board of Immigration Appeals in *Matter of Babaisakov*, 24 I & N Dec. 306 (2007). Opp. at 11—13. Even apart from the purely hypothetical nature of this argument in the face of an admitted circuit split, *Brand X*, as this reply will demonstrate, has no application here, for the Petitioner's claim rests upon the plain language of the statute and is governed by a special rule of statutory construction, namely the rule of lenity or narrow construction, not applicable to the regulatory scheme at issue in *Brand X*, and overlooked by the government in opposing certiorari. Furthermore, unlike the telecommunications statute at issue in *Brand X*, the aggravated felony provision here forms an integral part of a federal criminal statute, 8 U.S.C. § 1326(b)(2) (re-entry after conviction of an aggravated felony), to which *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984) is inapplicable. *See, e.g., Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J.

concurring) (*Chevron* does not require judicial deference to executive interpretations of criminal law provisions).

While the government also addresses the merits, these arguments provide no cogent basis for declining review in the face of an acknowledged split among the circuits. In particular, the government's claim that following the plain language of 8 U.S.C. § 1101(a)(43)(M)(i), as the Second and Ninth Circuits have done, would render this provision lifeless is belied by the many state and federal criminal statutes that include specific loss elements. A sample is set forth in the appendix accompanying this reply. These criminal statutes are plainly what Congress had in mind in enacting the plain language of 8 U.S.C. § 1101(a)(43)(M)(i)

A. *An Acknowledged Circuit Split Exists*

The government concedes that a definite circuit split exists. Opp. at 6, 12. This recognized divergence creates radically different standards for removability and contravenes the Founders' intent embodied in U.S. Const. Art. I, § 8, Cl. 4 to establish a uniform rule of naturalization. Furthermore, this split also creates different standards for punishment under 8 U.S.C. § 1326(b)(2) (re-entry after conviction of an aggravated felony), a matter of no small moment given the fact that the current Sentencing Guidelines provide for at least an eight level enhancement and a maximum term of 20 years. *See* U.S.S.G. § 2L1.2(b)(1)(C).

In the face of this conceded split, the government resists certiorari on the speculative ground the present conflict *may* resolve itself in light of *Brand X* and

Babaisakov[1]. First, the government can point to no authority to suggest that the resolution of this conflict has actually happened with respect to the aggravated felony issue presented here. Indeed, in *Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008), handed down after both *Babaisakov* and *Brand X*, the Second Circuit had no difficulty in reversing the underlying Board precedent in *Matter of Gertsenshteyn*, 24 I & N Dec. 111 (BIA 2007), which had abandoned the categorical approach and permitted fact-finding beyond the record of conviction to sustain an aggravated felony charge under 8 U.S.C. § 1101(a)(43)(K) (managing prostitution for commercial advantage). Moreover, the Board decision in *Matter of Gertsenshteyn* had been a principal mainstay for the holding in *Babaisakov*, 24 I & N Dec. at 312 that loss, like commercial advantage in *Gertsenshteyn*, could be determined by independent fact-finding beyond what was established in the adjudication of guilt. In short, presented with the reasoning underpinning *Babaisakov*, the Second Circuit, where Mr. Nijhawan was convicted, has continued to adhere to the same categorical approach exemplified by *Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007)[2]. Likewise, *Kawashima v. Mukasey*, 530

[1] Ironically, this BIA decision underscores the breadth of the Circuit split in noting that the weight of Circuit court authority runs against the Board and the decision ". . . represents a departure from precepts that have been presumed to apply in immigration hearings involving aggravated felony charges arising under [8 U.S.C. §1101(a)(43)(M)(i)]." 24 I & N Dec. at 316, 322.

[2] Certainly *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) signals no departure from *Dulal-Whiteway*, for *James* did not (Cont'd)

F.3d 111 (9th Cir. 2008), *petition for reh'g en banc pending* Nos. 04-7431 and 05-74407 (filed Sept. 15, 2008), handed down after both *Babaisakov* and *Brand X* directly contravenes the decision below.

Second, *Brand X* itself does not support the government's speculative contention. First, unlike the situation in *Brand X*, the Petitioner's arguments here rest upon the plain language of the statute, to which *Chevron* deference does not apply. Second, *Brand X* itself took care to note that no other rule of construction such as the rule of lenity was applicable, 545 U.S. at 985, whereas here the rule of lenity or narrow construction is directly applicable though ignored by the government in opposing certiorari. Third, the telecommunications statute at issue in *Brand X* was not part of a federal criminal statute, where *Chevron* analysis would not be applicable in the first place. *See, e.g., Crandon*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring); *Matter of Carachuri-Rosendo*, 24 I & N Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference; instead we owe deference to the meaning of Federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals."). Conviction for an aggravated felony is an essential element of the federal criminal statute punishing illegal reentry and therefore its

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(Cont'd)

involve a departure from the categorical approach to permit fact-finding beyond the record of conviction but rather whether the modified categorical approach applied where a criminal statute defined only one generic offense but might be violated in a manner that would put an alien in a removable category.

definitive construction rests with the federal courts[3]. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 264, 258 (2006); *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."). Indeed in *Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004), for example, this Court did not even refer to *Chevron* in reversing on an aggravated felony issue. By contrast, the provision[4] at issue in *INS v. Aguirre—Aguirre*, 526 U.S. 415 (1999), where *Chevron* deference was accorded, was not also part of a federal criminal statute but was freighted with foreign policy concerns about whether an alien's violent crime in a friendly foreign nation constituted a political offense, concerns not remotely present in this case. Reliance upon the plain language of 8 U.S.C. § 1101(a)(43)(M)(i), the rule of lenity and the role of an immigration provision as part a federal criminal statute also serves to distinguish this case from both the decision by a panel of Seventh Circuit in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), *pet. for cert.*

[3] Ironically, *Babaisakov*, which was handed down well before the decision below, was not cited by the panel majority, though urged by the government, while Third Circuit precedent does not accord *Chevron* deference to aggravated felony determinations. *Singh v. Ashcroft*, 383 F.3d 144, 151(3d Cir. 2004). Likewise, while citing to *Brand X*, *Babaisakov*, 24 I & N Dec. at 324, acknowledges that the Board will "ordinarily follow" controlling precedent in the Circuit where the case arises.

[4] The provision at issue was then 8 U.S.C. §1253(h)(2)(c), now 8 U.S.C. §1251(b)(3)(B)(iii), and barred an alien from withholding of removal if "there are serious reasons for considering that the alien has committed a serious nonpolitical offense outside the United States prior to the arrival of the alien in the United States."

pending, No. 08-552 (filed Oct. 23, 2008) and *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008)[5] both of which concern the meaning of crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i) and do not address the rule of lenity or the role of an immigration statute as part of a federal criminal statute. *Compare Leocal*, 543 U.S. at 12n. 8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies"). Thus despite the broad language from the panel decision in *Ali* about "administrative discretion," Opp. at 13, this case deals with the plain language of a statute forming part of criminal statute with interpretation guided by a controlling rule of statutory construction.

In short, the government's argument that *Brand X* may resolve the recognized Circuit split represents mere speculation without any solid legal foundation, while the government can point to no single instance where any court of appeals has retreated from an earlier aggravated felony determination based upon *Brand X* and *Babaisakov*.

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[5] While the November 7, 2008 decision in *Silva-Trevino*, which arose in the Fifth Circuit, does endorse *Babaisakov* in dictum, this Parthian foray into recasting a century of jurisprudence on crimes involving moral turpitude is subject to an extensive motion for reconsideration by interested amici contending that the decision was issued without any opportunity for meaningful participation by the alien's counsel or other interested parties. *See* Memorandum of Law of Amici Curiae In Support of Reconsideration available at www.nysda.org/idp/webPages/other.htm.

B. *The Government Cannot Overcome The Plain Statutory Language*

In attempting to defeat certiorari by contesting the merits, the government's arguments founder on the plain language of the statute as well as this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-7 (2007) reaffirming the application of the categorical approach under *Taylor v. United States*, 495 U.S. 575, 599 (1990) to aggravated felony determinations. *See also Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal, supra*, R. Sharpless, "Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law," 62 U. Miami L. Rev. 679, 1004 (2008) (hereinafter "Test") (*Duenas-Alvarez* "settled any debate" on applicability of *Taylor* to aggravated felony determinations.). Indeed, as the BIA itself has noted the categorical approach has a venerable history that goes back nearly a century. *Matter of Velasquez-Herrera*, 24 I & N Dec. 503, 513 (2008)

> For nearly a century, the Federal circuit courts of appeal have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted* to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.

(Emphasis in original). Significantly here, moreover, Section 101(a)(43)(M)(i) of the Immigration & Nationality Act of 1952, as amended (the "Act"), was

enacted in 1994, some four years after *Taylor* as part of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 4305 and there is nothing in that legislation to suggest that Congress intended to carve out an exception to *Taylor*.

Similarly, as the Second Circuit held *Gertsenshteyn*, 544 F.3d at 145, ". . . the [Act] premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been formally *convicted* of in a court of law." (emphasis in original). Thus 8 U.S.C. § 1227(a)(2)(A)(iii) expressly provides that only ". . . an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied). Moreover, despite the government's truncated reading, Opp. at 9, the plain language of the definition applicable to this case leaves no doubt that the *entire* definition must be satisfied by conviction. Thus Section 101(a)(43)(M)(i) expressly provides that "aggravated felony" includes "an offense *that* . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ." (emphasis supplied). There is simply no plausible way to read the restrictive clause beginning with "that" as not including the loss requirement, a point underscored by the use of "in."

In other words the plain language of this restrictive clause is simply not limited to fraud or deceit, as the government erroneously contends. Opp. at 9, since "in which" is part of this same restrictive clause setting forth all the requirements for conviction of this

aggravated felony. Expressed in simple mathematical terms the government's error would be akin to an argument that multiplying a times (b+c) actually equals ab + c, where a is conviction and b and c combined are fraud and deceit plus the loss requirement, all part of the same restrictive clause that must be satisfied by conviction.

That the plain language of 8 U.S.C. § 1101(a)(43)(M)(i) may sometimes make removal difficult, however, "is no reason for immigration courts to renounce the restrictions that . . . the law requires." *Gertsenshteyn*, 544 F.3d at 148. The government's argument by analogy to 8 U.S.C. § 1101(a)(43)(ii), Opp. at 8, fails to recognize that a necessary requirement for conviction under 26 U.S.C. § 7201 is a tax deficiency or revenue loss with some jurisdictions even requiring a substantial loss. *Boulware v. United States*, 128 S.Ct. 1168, 1172—73 (2008). In short, requiring an alien defendant to have been convicted of the required loss under 8 U.S.C. § 1101(a)(43)(M)(i) is fully consistent with 8 U.S.C. § 1101(a)(43)(M)(ii) since conviction for a loss must be shown under that criminal tax statute as well, a point that *Babaisakov*, 24 I & N Dec. at 314, gets flatly wrong, overlooking settled law summarized by this Court in *Boulware*.

Furthermore, applying this provision as written will hardly render this removal ground largely inoperative as the government contends. Opp. at 8. Even the modest survey of federal and state criminal statutes in the appendix confirms that there are host of such statutes where loss, even loss exceeding $10,000 must be established for conviction. *See, e.g.*, Colorado Statute § 18-4-409 (second degree aggravated vehicle theft here

the vehicle is taken by deception is a class 5 felony if value of the care exceeds $20,000; Conn. Gen. Stat. § 53a-122 (first degree larceny by false premises, false pretenses, trick or fraud requires value of property taken to exceed $10,000). In short, these are the kinds of statutes to which Congress referred in enacting 8 U.S.C. § 1101(a)(43)(M)(i). In addition to the federal statutes cited in the appendix, a broad range of other federal statutes may have loss determined by jury or plea under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the maximum fine based on loss calculations is sought pursuant to 18 U.S.C. § 3571(d). *See, e.g., United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) (where maximum fine sought, loss must be submitted to jury under *Apprendi*).

With respect to other considerations addressed in the government's decision, the vice inherent in the decision below with respect to burden of proof is really two fold. First, an aggravated felony determination has been moved from a legal question, with clear, bright lines for resolution, and made into a factual one. *See Conteh v. Gonzales*, 461 F.3d 45, 68 (1st Cir. 2006) (Hug, J., dissenting) (whether a prior conviction is an aggravated felony is "a pure question of law," which necessarily does not turn on the burden of proof). In other words, since loss, as a matter of law, must have been established in the adjudication of guilt, which requires proof beyond a reasonable doubt, there is no change in the burden of proof in immigration proceedings under the position urged by he Petitioner and adopted by the dissent below, but, instead, adherence to the legal requirement of loss being established by conviction. Test at 1009, which notes this difference. Second, the decision below, in

making loss a factual matter found outside the record of conviction under a clear and convincing standard, effectively throttles the legal requirement that loss be established in the adjudication of guilt, which requires proof beyond a reasonable doubt. Furthermore, by allowing restitution orders to satisfy this requirement, the decision below, as the dissent here and in *Conteh* persuasively recognize, even lowers the burden of proof below clear and convincing for those orders are based on a preponderance of the evidence. *See, e.g., In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990)

Furthermore, even if *Silva-Trevino* can be read as accepting the administrative burden of making loss a factual matter for resolution by the already overburdened Immigration Courts, Opp. at 11, this does not address the burden on the courts of appeals in applying the newly minted "tethering test" adopted below. Test at 1033n. 254 and material cited, which note the burdens imposed on the courts of appeals from immigration appeals. At the same time, however, this sacrifices fundamental fairness concerns in ensuring predictability, uniformity and even evidentiary reliability that are a hallmark of the categorical approach noted by this Court in *Taylor*, 495 U.S. at 601-602, but abandoned below. Indeed, as *Gertsenshteyn*, 544 F.3d at 146 wisely observes, "practical evidentiary difficulties and potential unfairness associated with looking behind [an alien's offense] of conviction [are] no less daunting in the immigration [context] than in the sentencing context." *See also* Test at 103-34 (*Babaisakov* approach "is especially impractical when adjudicators are expected to handle a high volume of cases," and "wastes

administrative resources and risks becoming 'unworkable.'"). In any event, as urged above, this case presents a clear instance where the statutory language requires loss to be established by conviction rather than found as a fact by the Immigration Courts. Accordingly, unlike *Silva-Trevino*, this is not a case where an added administrative burden must be assumed to vindicate a clear statutory command.

To the extent that that the government seeks to recast the questions presented, Opp. at I, this omits the rule of lenity or narrow construction. Moreover, such recasting places unwarranted emphasis upon the sentencing stipulation, for the jury was not instructed to find any loss and this Court held long ago that a jury verdict cannot be modified by stipulation at sentencing. *See United States v. Norris*, 281 U.S. 619 (1930) (stipulation at sentencing stage "cannot be regarded as evidence upon the question of guilt or innocence . . ." Likewise the government's attempted reformulation also overlooks the fact the both the government and the District Court agreed at sentencing that Mr. Nijhawan had not caused a loss in excess of $10,000. Pet. at 7. In short, the questions presented in the petition were correctly formulated for consideration on certiorari, and the government's attempt to narrow or recast them should be rejected.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Attorney for Petitioner

APPENDIX

APPENDIX — SURVEY OF CRIMES WITH ELEMENT OF FRAUD OR DECEIT AND LOSS TO VICTIMS OF MORE THAN $10,000

FEDERAL - 18 U.S.C. § 668 (theft by fraud from a museum of an object of cultural heritage worth more than $100,000); 18 U.S.C. § 1031 (major fraud of United States where value of property or services is $1,000,000 or more); 18 U.S.C. § 1039 (fraud in connection with obtaining confidential phone records information where violation is part of a pattern involving more than $100,000).

ALASKA - Alaska St. 11.46.120 (theft in the first degree if value of property is $25,000 or more, where theft can be committed by "theft by deception," defined in Alaska St. 11.46.180); Alaska St. 11.46.130 (theft in second degree if value of property is $500 or more but less than $25,000, where theft can be committed by "theft by deception," defined in Alaska St. 11.46.180); Alaska St. 11.46.280 (issuing a bad check is class B felony if face amount of check is $25,000 or more; class C felony is face amount of check is $500 or more but less than $25,000).

ARIZONA - Arizona Statute § 13-1802 (E) (theft of property or services of value of more than $25,000 is a class 2 felony; theft of property or services between $4,000 and $25,000 is class 3 felony, where obtaining property or services is by misrepresentation); Arizona Statute § 13-2109 (credit card transaction record theft, where merchant presents with intent to defraud a credit card transaction not completed by the merchant, is a class 3 felony if value is more than $3,000 but less than $25,000).

Appendix

COLORADO - Colorado Statute § 18-4-401(2)(c) (theft by deception is class 4 felony if value is between $1,000 and $20,000); Colorado Statute § 18-4-401(2)(d) (theft by deception is class 3 felony if value of thing involved is more than $20,000); Colorado Statute § 18-4-401(4) (theft by deception twice or more within six months, when aggregate value is between $1,000 and $20,000 is class 4 felony, and class 3 felony if value is more than $20,000); Colorado Statute § 18-4-409 (aggravated vehicle theft in the first degree, where car taken by deception, is a class four felony if value of car is $20,000 or less, and aggravated vehicle theft in the second degree, where car taken by deception, is a class 5 felony if value of car is $20,000 or more, and a class 6 felony if value of car between $1,000 and $20,000).

CONNECTICUT - Conn. Gen. Stat. § 53a-122 (larceny, which can be committed by false promises, false pretenses, trick or fraud (§ 53a-119), is larceny in first degree when value of property or services taken is more than $10,000); Conn. Gen. Stat. § 53a-129b (identity theft is first degree when value of property or services taken exceeds $10,000).

FLORIDA - Fla. Stat. § 812.014 (2)(c)(3) (grand theft of the third degree, and third degree felony, if value of property is more than $10,000 and less than $20,000, where taking of property can be by fraud, misrepresentation, or false promises (§ 812.012)).

Appendix

ILLINOIS - 720 Ill. Comp. Stat. 5/16G-15 (identity theft of property valued at more than $10,000 but less than $100,000 is a Class 1 felony; if value between $10,000 and $100,000 and taken from active duty military personnel, it is a Class X felony; if value more than $100,000, it is a Class X felony); 720 Ill. Comp. Stat. 5/16-1 (theft of property exceeding $10,000 and not exceeding $10,000 is a Class 2 felony; theft of property between $100,000 and $500,000 is a Class 1 felony; theft of property valued at more than $500,000 is a non-probationable Class 1 felony).

INDIANA - Ind. Code § 35-43-4-2 (receiving stolen property is a Class C felony if more than $100,000 and can be committed by failing to correct a false impression held by the victim); Ind. Code § 35-43-5-3.5 (identity theft is a Class C felony if the fraud or harm caused is at least $50,000); Ind. Code § 35-43-5-7.1 (Medicaid fraud is a Class C felony if harm caused is at least $100,000); Ind. Code § 35-43-5-7.2 (Insurance Fraud is a Class C felony if harm caused is at least $100,000); Ind. Code § 35-43-5-12 (Check Fraud is a Class C felony if aggregate amount of property obtained is at least $25,000).

IOWA - Iowa Code § 714.2 (theft of property valued at $10,000 or more is theft in first degree and a Class C felony); § 174.9 (fraudulent practice in the first degree is fraudulent practice involving money or property worth more than $10,000, and is a Class C felony); §715A.6 (fraudulent use of a credit card is a Class C felony if value of services secured is greater than $10,000).

KANSAS - Kan. Stat. Ann. § 21-3701 (theft, where property can be obtained by deception, of property valued more than $25,000 but less than $100,000 is a severity level 7 felony; theft of property valued more than $100,000 is a severity level 5 felony; theft of property valued between $1,000 and $25,000 is a severity level 9 felony); Kan. Stat. Ann. § 21-3704 (theft of services, where theft can be accomplished by deception or false device, where value is more than $100,000 is severity level 5 felony; theft of services where value is more than $25,000 but less than $100,000 is severity level 7 felony; theft of services where value is more than $1,000 but less than $25,000 is severity level 9 felony); Kan. Stat. Ann. § 21-3707 (giving a worthless check is severity level 7 if amount of check is $25,000 or more; giving a worthless check is severity level 7 if amount of check is between $1,000 and $25,000); Kan. Stat. Ann. § 21-3763 (counterfeiting of the retail value of $25,000 or more is a severity level 7 felony; counterfeiting of the retail value between $1,000 and $25,000 is a severity level 9 felony).

MAINE - Me. Rev. Stat. Ann. tit. 17, § 353 (theft by unauthorized taking or transfer is a Class B crime if value of property is $10,000 or more); Me. Rev. Stat. Ann. tit. 17, § 354 (theft by deception is a class B crime if value of property is $10,000 or more); Me. Rev. Stat. Ann. tit. 17, § 354-A (theft by insurance deception is Class B crime if value of property is $10,000 or more); Me. Rev. Stat. Ann. tit. 17, § 357 (theft of services, which can be by deception, is Class B crime if value of property is $10,000 or more); Me. Rev. Stat. Ann. tit. 17, § 703

(forgery with intent to deceive is Class C crime if value of written instrument is more than $10,000).

MICHIGAN - Mich. Comp. Laws § 750.218 (false pretenses with intent to defraud where amount of goods or services involved is $20,000 or more); Mich. Comp. Laws § 750.219a (obtaining telecommunications services with intent to avoid charge where value of services taken is more than $20,000); Mich. Comp. Laws § 750.356 (larceny is a felony if value of property taken is more than $20,000).

MINNESOTA - Minn. Stat. § 609.52 (theft, which can be by fraud or false pretenses, where value of property is more than $35,000); § 609.527 (identity theft where loss is more than $35,000); § 609.632 (counterfeiting of money where value of currency is more than $35,000); § 609.631 (offering a forged check with intent to defraud where value of check is more than $35,000).

MISSOURI - Mo. Ann. Stat. § 570.030 (any stealing offense where value is an element of offense is a Class B felony if value more than $25,000); § 250.233 (identity theft resulting in harm exceeding $50,000 is a class A felony).

MONTANA - Mont. St. 45-6-301 (theft of property by embezzlement where property is valued at more than $10,000).

NEW JERSEY - N.J. Stat. Ann. § 2C:21-17(c)(2)(theft of identity where benefit derived is between $500 and $75,000 is a crime in the second degree); §2C:21-17(c)(3) (identity theft where benefit derived is above $75,000 is a crime in the second degree).

NEW MEXICO - N.M. Stat. § 30-16-6 (fraud where value of property taken is more than $20,000 is a second degree felony); N.M. Stat. § 30-16-8 (embezzlement where value of property is more than $20,000 is a second degree felony); N.M. Stat. § 30-16-10 (forgery where value of damage is over $20,000 is a second degree felony); N.M. Stat. § 30-16-11 (receipt of stolen property where value of property is over $20,000 is a second degree felony); N.M. Stat. § 30-16-20 (shoplifting where value of property is over $20,000 is a second degree felony); N.M. Stat. § 30-16-33 (fraudulent use of a credit card where value of property taken is over $20,000 is a second degree felony); N.M. Stat. § 30-16-36 (receipt of property obtained through a fraudulent credit card transaction, where value of property obtained is over $20,000 is a second degree felony); N.M. Stat. § 30-44-7 (Medicaid fraud where harm is over $20,000 is a second degree felony).

NEW YORK - N.Y. Penal Law § 155.40 (grand larceny in the second degree is larceny, which can be accomplished by trick, of more than $50,000); N.Y. Penal Law § 155.42 (grand larceny in the first degree is larceny, which can be accomplished by trick, of more than $1,000,000); N.Y. Penal Law § 158.25 (welfare fraud in the first degree when value of benefits taken exceeds

$1,000,000); N.Y. Penal Law § 155.20 (welfare fraud in the second degree when value of benefits taken exceeds $50,000); N.Y. Penal Law § 165.73 (trademark counterfeiting, which requires intent to defraud, in the first degree where retail value of counterfeit goods exceeds $100,000); N.Y. Penal Law § 176.30 (insurance fraud in first degree where value of property exceeds $1,000,000); N.Y. Penal Law § 176.25 (insurance fraud in second degree where value of property exceeds $50,000); N.Y. Penal Law § 177.25 (health care fraud in first degree where value of payment wrongfully received exceeds $1,000,000); N.Y. Penal Law § 177.20 (health care fraud in second degree where value of payment wrongfully received exceeds $50,000); N.Y. Penal Law § 177.15 (health care fraud in third degree where value of payment wrongfully received exceeds $10,000).

NORTH CAROLINA - N.C. Gen. Stat. § 14-90 (embezzlement of property from employment, where value of property is more than $100,000 is Class C felony); N.C. Gen. Stat. § 14-92 (embezzlement of property by public officer where value of property is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-91 (embezzlement of State property by public officers where value of property is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-93 (embezzlement of funds by treasurers of charitable organizations where value of property is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-94 (embezzlement of property by officers of railroad companies where value of property is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-98

(embezzlement of partnership funds by surviving partner where value of property is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-99 (embezzlement of taxes by officers where value of taxes is more than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-97 (appropriation of partnership funds by partner for personal use where value of funds is greater than $100,000 is a Class C felony); N.C. Gen. Stat. § 14-100 (obtaining property by false pretenses where value of property is more than $100,000 is Class C felony).

NORTH DAKOTA - N.D. Cent. Code § 12.1.23.05 (theft, which includes larceny by trick and embezzlement, is a Class B felony if value of services or property is valued at more than $10,000); N.D. Cent. Code § 12.1.24.01 (forgery or counterfeiting is a Class B felony if scheme is to defraud of money or property in excess of $10,000).

OHIO - Ohio Rev. Code. Ann. § 2913.02 (theft, which can be accomplished by deception, is aggravated theft, a third degree felony, if value taken is between $100,000 and $500,000; theft is aggravated theft, a second degree felony, if value taken is between $500,000 and $1,000,000; theft is aggravated theft, a first degree felony, if value taken is more than $1,000,000); Ohio Rev. Code Ann. § 2913.05 (telecommunications fraud is a felony of the third degree if value of benefit obtained is more than $100,000); Ohio Rev. Code Ann. § 2913.11 (passing bad checks valued at $100,000 or more is a felony of the third degree); Ohio Rev. Code Ann. § 2913.21 (misuse of credit cards, which includes an intent to defraud, when value of property involved is $100,000 or more is a felony of

the third degree); Ohio Rev. Code Ann. § 2913.31 (forging identification cards, where loss to victim is $100,000 or more, is felony of third degree) Ohio Rev. Code Ann. § 2913.34 (trademark counterfeiting where loss is $100,000 or more is felony of third degree); Ohio Rev. Code Ann. § 2913.40 (Medicaid fraud where value of services obtained is $100,000 or more is felony of third degree); Ohio Rev. Code Ann. § 2913.45 (defrauding creditors is third degree felony where value property involved is $100,000 or more); Ohio Rev. Code Ann. § 2913.47 (insurance fraud where value of false claim is $100,000 or more is third degree felony); Ohio Rev. Code Ann. § 2913.49 (identity fraud where value of services or property obtained is $100,000 or more is second degree felony); Ohio Rev. Code Ann. § 2913.51 (receipt of stolen property where property is valued at $100,000 or more is third degree felony).

OKLAHOMA - Okla. Stat. tit. 21, § 1451 (embezzlement of $25,000 or more is felony with maximum punishment of 10 years).

OREGON - Or. Rev. Stat. § 164.125 (theft of services, which can be accomplished by deception, valued at $10,000 or more is a Class B felony).

PENNSYLVANIA - 18 Pa. Cons. Stat. Ann. § 4105 (passing a bad check is misdemeanor of first degree if value between $1,000 and $75,000; passing bad check is felony of third degree if value is more than $75,000); 18 Pa. Cons. Stat. Ann. § 4119 (trademark counterfeiting is felony of second degree if value of property or services is more than $10,000).

SOUTH DAKOTA - S.D. Codified Laws 22-30A-17.1 (theft, including embezzlement and fraudulent theft, of more than $100,000 is aggravated grand theft, a Class 3 felony).

TENNESSEE - Tenn. Code Ann. § 39-14-105(4) (theft, including larceny by trick, false pretenses, fraudulent conversion, or embezzlement, is a Class C felony if property or services stolen are valued between $10,000 and $60,000); § 39-14-105(5) (theft is a Class B felony if property or services stolen are valued at more than $60,000); Tenn. Code Ann. § 39-14-121 (passing worthless check punished determined by value of check, according to values laid out in § 39-14-105); Tenn. Code. Ann. § 39-14-133 (insurance fraud is punished according to value of fraud, according to values laid out in § 39-14-105).

TEXAS - Tex. Penal Code Ann. § 31.03 (theft, including by trick or fraud, is felony of third degree if value of thing stolen is between $20,000 and $100,000; theft is felony of second degree if value of thing stolen is between $100,000 and $200,000; theft is felony of first degree if value of things stolen is greater than $200,000); Tex. Penal Code Ann. § 31.04 (theft of services is felony of third degree if value of service stolen is between $20,000 and $100,000; theft of services is felony of second degree if value of service stolen is between $100,000 and $200,000; theft of services is felony of first degree if value of service stolen is greater than $200,000); Tex. Penal Code Ann. § 31.16 (organized retail theft is felony of third degree if value involved is between $20,000 and

$100,000; organized retail theft is felony of second degree if value involved is between $100,000 and $200,000; organized retail theft is felony of first degree if value involved is greater than $200,000); Tex. Penal Code Ann. § 32.23 (trademark counterfeiting is felony of third degree if retail value involved is between $20,000 and $100,000; trademark counterfeiting is felony of second degree if retail value involved is between $100,000 and $200,000; trademark counterfeiting is felony of first degree if retail value involved is greater than $200,000); Tex. Penal Code Ann. § 32.32 (false statement to obtain property or credit is felony of third degree if value of property or credit is between $20,000 and $100,000; false statement to obtain property or credit is felony of second degree if value of property or credit is between $100,000 and $200,000; false statement to obtain property or credit is felony of first degree if value of property or credit is greater than $200,000); Tex. Penal Code Ann. § 31.35 (credit card transaction record laundering is felony of third degree if amount of record of sale is between $20,000 and $100,000; credit card transaction record laundering is felony of second degree if amount of record of sale is between $100,000 and $200,000; credit card transaction record laundering is felony of first degree if amount of record of sale is greater than $200,000); Tex. Penal Code Ann. § 35.02 (insurance fraud is felony of third degree if amount of fraud is between $20,000 and $100,000; insurance fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; insurance fraud is felony of first degree if amount of fraud is greater than $200,000); Tex. Penal Code Ann. § 35A.02 (Medicaid fraud is felony of third

degree if amount of fraud is between $20,000 and $100,000; Medicaid fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; Medicaid fraud is felony of first degree if amount of fraud is greater than $200,000).

VERMONT - Vt. Stat. Ann. tit. 13, § 2024 (workers compensation fraud of more than $10,000 carries 3 year maximum penalty).

WISCONSIN - Wis. Stat. § 943.20 (theft, which includes theft by deception, of property exceeding $10,000 in value is Class G felony); Wis. Stat. § 943.41 (credit card fraud of an amount more than $10,000 is Class G felony); Wis. Stat. § 943.50 (retail theft of more than $10,000 in property is Class G felony); Wis. Stat. § 943.91 (thefts from and fraud of financial institutions are Class G felonies if amount taken is between $10,000 and $100,000; theft from and fraud of financial institutions are Class E felonies if amount taken is above $100,000).

JOINT APPENDIX

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(5)

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

No. 08-495

IN THE

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

EDWIN S. KNEEDLER
Acting Solicitor General
of the United States
950 Pennsylvania Avenue, NW
Room 5614
Washington, DC 20530-0001
(202) 514-2217

Attorney for Respondent

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

Attorney for Petitioner

PETITION FOR CERTIORARI FILED OCTOBER 14, 2008
CERTIORARI GRANTED JANUARY 16, 2009

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DOCKETED AUGUST 31, 2006

General Docket
Third Circuit Court of Appeals

Docketed: 08/31/2006
Termed: 05/02/2008

Court of Appeals Docket #: 06-3948

Nijhawan

v.

Atty Gen USA

Appeal From: Board of Immigration

Case Type Information:
1) agency
2) petition review
3) Immigration

Originating Court Information:
District: BIA-1 : A39-075-734
Date Filed:

* * *

08/31/2006	Agency Case Docketed. Petition (rev) filed by Manoj Nijhawan. Service made on 9/1/06. USCA Receipt No. 48474 and Receipt Date 8/31/06. (LML)

* * *

Appendix A

10/02/2007 MOTION by Petitioner Manoj Nijhawan for stay of removal, filed. Answer due 10/15/07. Certificate of Service dated 10/1/07. (LML)

* * *

10/04/2007 ORDER (Rendell, Authoring Judge, Stapleton, Circuit Judges, and Irenas*, District Judge) granting motion by Petitioner Manoj Nijhawan for stay of removal based upon the likelihood of success of petitioner upon consideration of the petition for review and the motion for stay. This order is being entered without awaiting the filing of the Attorney General's response to the motion, in light of the imminent release of petitioner from custody and the possibility that he could be removed before the panel receives the response (due to be filed on October 15, 2007). The panel will consider the response when filed and retains jurisdiction to amend this order if the response convinces the panel that the stay was improvidently entered, filed. *Honorable Joseph E. Irenas, United States District Judge for the District of New Jersey, sitting by designation. (LML)

* * *

10/22/2007 ORDER (Rendell, Authoring Judge, Stapleton, Circuit Judges, and Irenas*, District Judge) upon further consideration of the motion by petitioner Manoj Nijhawan for stay of removal, as well as the response by respondent in opposition to petitioner's motion for stay of removal and the reply by petitioner in support

of continuing stay of removal, it is hereby ordered that the stay of removal granted in this Court's Order entered on October 4, 2007, shall remain in effect pending disposition of the petition for review and further order of this Court, filed. *Honorable Joseph E. Irenas, United States District Judge for the District of New Jersey, sitting by designation. (LML)

* * *

05/02/2008 PRECEDENTIAL OPINION Coram: RENDELL, STAPLETON and IRENAS, Circuit Judges. Total Pages: 46. Judge: RENDELL Authoring and Judge Stapleton Dissenting. (CMD)

05/02/2008 JUDGMENT, ORDERED and ADJUDGED by this Court that the Petition for Review is hereby DENIED. All of the above in accordance with the Opinion of this Court, filed. (CMD)

06/09/2008 Consent MOTION filed by Petitioner Manoj Nijhawan for Extension of Time to File Petition for Rehearing and Expand Page Limit. Certificate of Service dated 06/06/2008. (DMM)

06/13/2008 ORDER (RENDELL, Circuit Judge) granting Petitioner's consent Motion for extension of time to file petition for rehearing through June 17, 2008, and to expand the page limit from 15 to 30 pages, filed. Rendell, Authoring Judge. (DMM)

06/17/2008 PETITION filed by Petitioner Manoj Nijhawan for Rehearing before Original Panel and Court En Banc. Certificate of Service

dated 06/16/2008. (CMD)

07/17/2008 ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, *STAPLETON, Circuit Judges and *IRENAS, District Judge) denying Petition for en banc rehearing filed by Petitioner Manoj Nijhawan. Judge Ambro would have granted rehearing, filed. Marjorie O. Rendell, Authoring Judge. *The votes of Honorable Walter K. Stapleton, Senior Judge of the United States Court of Appeals for the Third Circuit and Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey are limited to panel rehearing only. (LML)

* * *

07/31/2008 ORDER (RENDELL, STAPLETON, Circuit Judges and IRENAS, District Judge) granting Motion to stay mandate filed by Petitioner Manoj Nijhawan until further order of the Court, filed. RENDELL, Authoring Judge. Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation. (LML)

* * *

10/20/08 U.S. Supreme Court Notice. Petition for Writ of Certiorari filed by Manoj Nijhawan on 10/14/2008. Supreme Court Case No. 08-495. (NB)

APPENDIX B — INDICTMENT EXCERPTS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED MAY 22, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S4 02 Cr. 673 (RMB)

UNITED STATES OF AMERICA,

- v. -

NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH,
HENRY CHU,
JOSIELYNN SALUMBIDES,
a/k/a "Lynn Salumbides,"
NAINA CHITRODA,
MANOJ NIJHAWAN,
NIKHIL RASTOGI,
UMESH MEISURIA,
ASHOK SHAH,
PRAVEEN SHARMA,
SANJAY ROHIRA, SHAZIA SATTAR,
a/k/a "Shazi Sattar,"
KAUSHIK AMIN,
AMIT NANGIA, and
UDHAY SHANKAR BALAKRISHNA,
a/k/a "Udhay Shankar,"

Defendants.

FILED UNDER SEAL

INDICTMENT

Appendix B

COUNT ONE

(Conspiracy to Commit Bank Fraud,
Mail Fraud and Wire Fraud)

The Grand Jury charges:

Relevant Persons and Entities

1. At all times relevant to this Indictment, Allied Deals Inc. ("Allied Deals") and SAI Commodity, Inc. ("SAI Commodity") were corporations organized and existing under the laws of the State of New York, and Hampton Lane, Inc. ("Hampton Lane") was a corporation organized and existing under the laws of the State of New Jersey. Allied Deals, SAI Commodity and Hampton Lane (collectively, the "Companies") had their principal places of business at 180 Centennial Avenue, Piscataway, New Jersey (the "Piscataway Office"), and were in the business of brokering sales of non-ferrous metal between vendors and purchasers worldwide, with many sales to purchasers in India, Hong Kong, Singapore, and the United Arab Emirates ("UAE").

2. At all times relevant to this Indictment, RBG Resources PLC, a/k/a "Allied Deals PLC" ("RBG Resources"), was a British corporation affiliated with the Companies, with its principal place of business in London, England. At all times relevant to this Indictment, RBG Resources purportedly was in the business of brokering sales of non-ferrous metal

between vendors and purchasers worldwide, with many sales to purchasers in India, Hong Kong, Singapore, and the UAE.

3. At certain times relevant to this Indictment, LA Metals Inc. ("LA Metals") and LA Commodities Inc. ("LA Commodities") were corporations organized and existing under the laws of the State of California; Esrod Metal Inc. ("Esrod"), Garden State Commodities Corp. ("Garden State"), Sun Metals Inc. ("Sun Metals"), Jersey Atlantic Metals Inc. ("Jersey Atlantic"), Jersey Metal Inc. ("Jersey Metal"), Kashmir Enterprises Inc. ("Kashmir"), Kennedy Metal Inc. ("Kennedy Metal"), Liberty Commerce Ltd. ("Liberty Commerce"), Liberty International Ltd. ("Liberty International"), Metalcom International Inc. ("Metalcom"), Midland Metal International ("Midland Metal"), Mettco Trading Inc. ("Mettco"), JRS Commodities ("JRS"), Kwality Trading Ltd. ("Kwality"), Millenium Trading Inc. ("Millenium"), Reliable Metal Trading Corp. ("Reliable"), Stanley Commodities Corp. ("Stanley"), Universal Metal Trading ("Universal"), World Trading Corporation ("WTC") were corporations organized and existing under the laws of the State of New Jersey; and Island Metal Corp. ("Island Metal") was a corporation organized and existing under the laws of the State of New York. These companies (collectively, the "Customers") purported to be in the business of purchasing and/or selling non-ferrous metal and purported to employ one or more of the Companies and/or RBG Resources to broker such purchases and sales.

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4. At all times relevant to this Indictment, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar" ("RASTOGI"), the defendant, was the Chief Executive Officer of each of the Companies. RASTOGI exercised control over the affairs of the Companies by, among other things, supervising the Companies' personnel, having responsibility for the Companies' bank accounts, and negotiating with the Companies' banks and contractors. At all times relevant to this Indictment, RASTOGI also exercised control over the affairs of the Customers by, among other things, supervising the Customers' personnel, having responsibility for the Customers' bank accounts, and directing the Customers' purported purchases and sales of non-ferrous metals. At all times relevant to this Indictment, RBG Resources was owned and controlled by Virendra Rastogi, a co-conspirator not named as a defendant herein and a brother of NARENDRA KUMAR RASTOGI, the defendant.

5. At all times relevant to this Indictment, GAYA GAYATRINATH, the defendant, was the Executive Director of Corporate Strategy and the Legal and Administration Counsel of the Companies. GAYATRINATH participated in the management and operations of the Companies by, among other things, supervising the Companies' personnel, having some responsibility for the Companies' bank accounts, and negotiating with the Companies' banks and customers. At all times relevant to this Indictment, GAYATRINATH also exercised control over the affairs of the Customers by, among other things, supervising

the Customers' personnel and having some responsibility over the Customers' corporate filings and legal affairs.

6. At all times relevant to this Indictment, Anil Anand, a co-conspirator not named as a defendant herein, was the Chief Financial Officer of each of the Companies. Anand participated in the management of the Companies by, among other things, supervising the Companies' personnel, having responsibility for the Companies' bank accounts, and negotiating with the Companies' banks and customers.

7. At certain times relevant to this Indictment, HENRY CHU, the defendant, was the Operations Manager of the Companies and the Chief Operating Office of WTC. CHU's duties at the Companies included, among other things, assisting in the procurement of fraudulent bank loans and representing the Companies in negotiations with the Companies' banks.

8. At all times relevant to this Indictment, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," the defendant, was the Traffic Manager for the Companies and, at certain times relevant to this Indictment, held herself out as an owner and officer of JRS Commodities. As Traffic Manager, SALUMBIDES was in charge of making arrangements for the physical shipment of metal. SALUMBIDES assisted the Companies by, among other things, arranging for metal shipments for the purported customers of both the Companies and RBG Resources.

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9. At all times relevant to this Indictment, NAINA CHITRODA, the defendant, was the Documentation Manager for the Companies. CHITRODA assisted the Companies by, among other things, supervising the Companies' personnel and arranging for documentation pertaining to purported purchases and sales of metal.

10. At certain times relevant to this Indictment, MANOJ NIJHAWAN, the defendant, was the Deputy General Manager of Allied Deals. NIJHAWAN held himself out as an assistant to Anil Anand, a co-conspirator not named as a defendant herein, provided accounting assistance to the Companies, and represented the Companies in negotiations with the Companies' banks.

11. At certain times relevant to this Indictment, NIKHIL RASTOGI (hereinafter, "NIKHIL RASTOGI"), the defendant, was an employee of one or more of the Companies, and at certain times relevant to this Indictment, held himself out as a representative of Universal Metal, among other Customers. NIKHIL RASTOGI did accounting for one or more of to the Companies, and assisted in preparing fraudulent documentation supplied to banks in order to procure bank loans.

12. At all times relevant to this Indictment, Jaspreet Basra, a/k/a "Soniya Basra," a co-conspirator not named as a defendant herein, was the Corporate Secretary to the Companies. Basra participated in the management and operations of the Companies by, among

other things, supervising the Companies' personnel and having some responsibility for the Companies' bank accounts. At all relevant times, Basra also exercised control over the affairs of the Customers by, among other things, supervising the Customers' personnel, having responsibility for the Customers' bank accounts, and directing the Customers' business activities.

13. At certain times relevant to this Indictment, UMESH MEISURIA, the defendant, was an employee of one or more of the Companies. MEISURIA prepared financial statements and did other accounting, including falsifying documents, for one or more of the Companies and one or more of the Customers and, at certain times relevant to this Indictment, permitted his residence address to be used as the address of the corporate headquarters of Esrod Metals.

14. At certain times relevant to this Indictment, ASHOK SHAH, the defendant, held himself out as an officer of both LA Metals and LA Commodities and, as such, purported to purchase and sell quantities of non-ferrous metals using one or more of the Companies and/or RBG Resources as a broker.

15. At certain times relevant to this Indictment, PRAVEEN SHARMA, the defendant, held himself out as an officer of both Garden State Commodities and Jersey Atlantic and, as such, purported to purchase and sell quantities of non-ferrous metals using one or more of the Companies and/or RBG Resources as a broker.

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16. At certain times relevant to this Indictment, SANJAY ROHIRA, the defendant, held himself out as an officer of both Esrod Metals and Sun Metal and, as such, purported to purchase and sell quantities of non-ferrous metals using one or more of the Companies and/or RBG Resources as a broker.

17. At certain times relevant to this Indictment, SHAZIA SATTAR, a/k/a "Shazi Sattar," the defendant, was an employee of the Companies and, at certain times relevant to this Indictment, held herself out to be a representative of Jersey Atlantic. SATTAR assisted the Companies by, among other things, doing accounting for one or more of the Companies, and assisted in preparing fraudulent documentation supplied to banks in order to procure bank loans.

18. At certain times relevant to this Indictment, KAUSHIK AMIN, the defendant, was the Public Relations Officer of one or more of the Companies and held himself out as an officer of Kennedy Metal, Jersey Metal and Liberty International. Through Kennedy Metal, Jersey Metal and Liberty International, AMIN purported to purchase and sell non-ferrous metals using one or more of the Companies and/or RBG Resources as a broker.

19. At certain times relevant to this Indictment, AMIT NANGIA, the defendant, was an employee of one or more of the Companies. NANGIA assisted the Companies by, among other things, providing accounting assistance to the Companies. NANGIA also facilitated

the Companies' control over their purported customers overseas by, among other things, supplying those customers with false information to submit to credit agencies.

20. At certain times relevant to this Indictment, UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendant, was the Treasurer of Allied Deals. SHANKAR held himself out as a financial officer, assisting the Companies in the procurement of bank loans and supplying the banks with documentation in support of those loans.

* * *

The Companies' Metal Trading Business

31. At all times relevant to this Indictment, the Companies held themselves out as metal trading companies that would broker deals between buyers and sellers of metal throughout the world. The Companies purportedly would facilitate sales of metal by, among other things, (i) locating metal suppliers for companies that were interested in buying metal, (ii) obtaining loans from banks to assist the buyer with the purchase of the metal from the seller, (iii) arranging for shipping of the metal, and (iv) extending credit to the buyer of the metal with a fixed period for repayment (often 180 days).

32. The banks from which the Companies obtained these loans included Chase, Fleet Bank, PNC Bank, KBC Bank, HVB, Dresdner, China Trust, Senstar and

General Bank, among others ("Victim Banks"). At all times relevant to this Indictment, the Victim Banks typically required that loans be secured by collateral, which would vary from bank to bank or loan to loan. For some loans, the collateral consisted of title to the metal itself. For other loans, the Companies assigned to the bank the "accounts receivable" for the particular sale — that is, the bank's collateral would consist of its right to collect the buyer's payment for its purchase of metal that it owed to the Companies.

33. At all times relevant to this Indictment, the Companies generally arranged for the shipments of metal between suppliers and customers overseas by booking the shipments through a shipping company. Under common industry practice, the shipping company generally prepared and provided three original bills of lading, identifying, among other things, the shipper/exporter, the consignee, and the ship and voyage number, and reflecting the numbers for the containers in which the metal was stored during shipment and a description of the metal being shipped. Each bill of lading issued by a shipping company typically bore that company's letterhead, a unique bill of lading number assigned by the shipping company, and the signature of a company representative. During the course of the voyage, the bill of lading typically constituted title to the shipment.

34. At all times relevant to this Indictment, before the banks released loan money to help finance a metal sale, the banks required the Companies to submit a

number of documents. For loans in which the banks relied on the metal inventory itself as collateral, the banks typically required that the Companies present them with the original bills of lading (the title) for a shipment of metal. For loans in which banks were relying on the accounts receivable (that is, the right to collect the money that the buyers owed to the Company) as collateral for the loans, the banks typically released the loan proceeds after the Company presented the bank with documents demonstrating that a bona fide transaction between the metal trading company and its customer had been completed. Typically, these documents included, among other things, a purchase order, an invoice, a copy of the bill of lading reflecting the shipment made to the customer, and/or a signed acknowledgment of receipt by the customer.

35. At all times relevant to this Indictment, the banks typically released the loan proceeds after receiving the required documents. Typically, the banks then wired the money to the Companies or directly to a metal seller's bank account. On or before the expiration of the loan's due date, the Company then was expected to repay the loan by sending the bank the money it collected from the Company's customers (the metal buyers) or by arranging for the metal buyers to pay the bank directly.

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THE FRAUDULENT SCHEME

36. Since at least in or about 1998, through on or about May 14, 2002, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, engaged in a fraudulent scheme to obtain hundreds of millions of dollars in loans from numerous major banks, including the Victim Banks. As part of the scheme, the defendants and their co-conspirators fraudulently induced the Victim Banks to issue a number of loans through an elaborate series of misrepresentations. These misrepresentations included: (i) falsely representing the nature of purported metal buyers, many of whom did not exist as actual metal companies or were controlled by the co-conspirators, (ii) making oral and written misrepresentations to the Victim Banks about sales of metal, including misrepresentations regarding the existence or type of metal sold, (iii) submitting purportedly "original" bills of lading to more than one Victim Bank (thereby using the same collateral to secure multiple loans), and (iv) providing to the Victim Banks forged bills of lading, invoices, and other documents.

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37. NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, held themselves out, and induced others to hold themselves out, as representatives of the purported metal customers. The defendants provided some of the Victim Banks with cell phone numbers purported to be those of the metal customers, but were in fact numbers belonging to one or more of the defendants or their co-conspirators.

38. Upon receiving these fraudulent loans from the Victim Banks, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named

as defendants herein, and others known and unknown, in many cases arranged for loan proceeds to be wired to various overseas accounts of purported metal sellers. While the defendants and their co-conspirators represented to the banks that the loan funds were to be paid to actual metal sellers for actual sales of metal, the accounts in fact were controlled by RASTOGI and his co-conspirators, or were held by corporate entities affiliated with Allied Deals, RBG Resources, SAI Commodity or Hampton Lane.

39. In or about the fall of 2001, the Companies failed to make a number of loan payments to the Victim Banks at or around their due dates. In an effort to conceal and advance the fraudulent scheme, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, engaged in a series of elaborate deceptions, designed to avoid detection and perpetuate and even expand the scheme by fraudulently obtaining additional loans from Victim Banks and engaging in other fraudulent transactions. Among other things, the defendants and their co-conspirators used loan proceeds

from one Victim Bank to make the loan payments required by another Victim Bank, while concealing that (i) the newly-issued loans were not being used to fund actual, arms-length metal transactions (contrary to the purported purposes of the loan) and (ii) the money used to pay off the loans had not been provided by the buyers of metal in bank-financed sales.

40. Between in or about late 2001 and early 2002, nearly all of the Victim Banks stopped receiving loan payments from the Companies and/or their purported customers (the purported metal buyers). When the Victim Banks commenced investigations of the loan defaults, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDIIAY SIIANKAR BALAKRISIINA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, undertook a series of steps to conceal the fraud and continue the scheme. These steps included: (i) providing the Victim Banks with various false explanations for their customers' loan defaults, (ii) arranging for persons in the United States, India and elsewhere falsely to pose as customers during interviews with representatives of the Victim Banks, and (iii) fabricating credit reports and

correspondence to create a false appearance that the purported suppliers and customers were bona fide companies, when in fact they were not.

THE CONSPIRACY

41. From at least in or about 1998 up to and including on or about May 14, 2002, in the Southern District of New York and elsewhere, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with others to commit offenses against the United States, to wit, bank fraud, in violation of 18 U.S.C. § 1344, mail fraud, in violation of 18 U.S.C. § 1341 and wire fraud, in violation of 18 U.S.C. § 1343.

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Objects of the Conspiracy

42. It was a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to defraud financial institutions, the deposits of which were insured by the FDIC, and to obtain moneys, funds, credits, assets, securities, and other property owned by, and under the custody and control of financial institutions, by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1344.

43. It was further a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi

Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme and artifice, and attempting so to do, would and did place in post offices and authorized depositories for mail matter, matters and things to be sent and delivered by the Postal Service and would and did deposit and cause to be deposited matters and things to be sent and delivered by private and commercial interstate carriers, and would and did take and receive therefrom, such matters and things, and would and did knowingly cause to be delivered by mail and such carriers according to the directions thereon, such matters and things, in violation of Title 18, United States Code, Section 1341.

44. It was further a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay

Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

45. Among the means and methods by which NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, would and did carry out the conspiracy were the following:

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a. The defendants and one or more of their co-conspirators fraudulently represented to the Victim Banks that the metal transactions used as collateral for loans obtained from the Victim Banks were between arms-length sellers and purchasers of metal, when in truth and in fact the purported "seller" and "buyer" constituted one of the many shell corporations affiliated with one or more of the Companies, including one or more of the Customers.

b. The defendants and one or more of their co-conspirators fraudulently identified on bills of lading the "shipper" and/or "consignee" of the metal purportedly being shipped, when in truth and in fact, the purported "shipper" and/or "consignee" constituted one of many shell corporations affiliated with one or more of the Companies, including one or more of the Customers.

c. The defendants and one or more of their co-conspirators purported to submit original bills of lading to the Victim Banks, seemingly providing the banks with collateral for the release of funds, when in truth and in fact the defendants and their co-conspirators submitted purported originals of the same bills of lading to more than one Victim Bank, thereby deceiving and depriving the Victim Banks of adequate security and obtaining for themselves double financing for the purported shipments.

d. The defendants and one or more of their co-conspirators presented the Victim Banks with bills of lading, purportedly reflecting that a particular type

of metal was being shipped overseas, when in truth and in fact the defendants materially misrepresented on the bills of lading the type of metal being shipped.

e. The defendants and one or more of their co-conspirators presented the Victim Banks with bills of lading, purportedly prepared by shipping companies and reflecting bona fide shipments overseas, when in truth and in fact the defendants manufactured numerous bills of lading, using blank forms from a shipping company or forms they prepared and reflecting non-existent inventory and shipments.

f. The defendants and one or more of their co-conspirators falsely represented to the Victim Banks that the loan proceeds would be used to finance metal trades involving bona fide suppliers, most of which were allegedly located in India, Hong Kong, Singapore, and the UAE, when in truth and in fact the accounts to which the proceeds were wired were owned or controlled by one or more of the defendants and their co-conspirators, or were corporate accounts of related entities. Examples of such entities include RBG Resources and the Companies, none of which had any legitimate involvement in the purported metals trade.

g. The defendants and one or more of their co-conspirators fraudulently obtained loan proceeds from one Victim Bank to pay down the debt owed to another Victim Bank on prior loans, and sought to make it appear that the purported buyers were paying for

metal they had purchased, when in truth and in fact they had not purchased any metal and had not provided the monies to pay down the debt.

h. The defendants and one or more of their co-conspirators fraudulently presented the Victim Banks with contact information and documents purporting to reflect the existence of bona fide customers/purchasers, when in truth and in fact the entities the defendants identified were often non-existent or mere shell companies, headed by nominees controlled by the defendants, lacking any apparent assets, and conducting no apparent metal business.

Overt Acts

46. In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. In or about 1998, NARENDRA KUMAR RASTOGI, the defendant, requested Anil Anand, a co-conspirator not named as a defendant herein, to recruit individuals to form nominee companies and pose as buyers or sellers of metal.

b. In or about July or August 1998, ASHOK SHAH, the defendant, filed papers with the State of California, forming LA Metals and LA Commodities.

c. In or about 1998, PRAVEEN SHARMA, the defendant, formed Garden State and Jersey Atlantic.

d. In or about 1998, SANJAY ROHIRA, the defendant, formed Esrod Metals and Sun Metal.

e. On or about April 19, 1999, AMIT NANGIA, the defendant, sent a letter to a co-conspirator not named as a defendant herein requesting certain financial information for Allied Deals-related companies in India.

f. In or about December 1999, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," the defendant, filled out paperwork in order to form JRS Commodities and submitted that paperwork to authorities of the State of New Jersey.

g. On or about September 24, 2001, GAYA GAYATRINATH, the defendant, and Anil Anand, a co-conspirator not named as a defendant herein, met with bank representatives at a branch office of Chase Bank located in New York, New York.

h. In or about September 2001, UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendant, faxed to Chase Bank in New York, New York, a letter concerning the non-payment of loans.

i. In or about November 2001, KAUSHIK AMIN, the defendant, applied for a bank loan from Fleet Bank on behalf of Kennedy Metal.

j. On or about November 28, 2001, UMESH MEISURIA, the defendant, sent a letter to NARENDRA KUMAR RASTOGI and Soniya Basra, a co-conspirator not named as a defendant herein, about MEISURIA's efforts to obtain a loan from Fleet Bank on behalf of Kennedy Metal.

k. In or about December 2001, SHAZIA SATTAR, a/k/a "Shazi Sattar," the defendant, told Soniya Basra, a co-conspirator not named as a defendant herein, that SATTAR would answer her cell phone using an alias in case a representative from a bank wanted to speak with a representative of Jersey Atlantic.

l. On or about January 14, 2002, NAINA CHITRODA, the defendant, signed an invoice for a sale of cobalt from Allied Deals to Reliable.

m. In or about December 2001, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," the defendant, spoke with a representative of General Bank regarding JRS Commodities' failure to make payment on a loan and told the bank representative that JRS Commodities' failure to make payment was due to a slow economy.

n. On or about January 25, 2002, General Bank issued a loan for the sale of cobalt from Allied Deals to Reliable.

o. In or about March 2002, HENRY CHU, the defendant, traveled to Hong Kong, where he posed as an officer of Huntington Industries, a company based in Hong Kong controlled by one or more of the defendants or their co-conspirators.

p. On or about March 24, 2002, NARENDRA KUMAR RASTOGI and MANOJ NIJHAWAN, the defendants, and Anil Anand, a co-conspirator not named as a defendant herein, met with bank representatives at a branch office of Fleet Bank located in New York, New York.

q. On or about May 1, 2002, NIKHIL RASTOGI, the defendant, sent a fax to NARENDRA KUMAR RASTOGI, the defendant, in connection with efforts to obtain financing on behalf of companies in Hong Kong affiliated with Allied Deals.

(Title 18, United States Code, Section 371.)

* * *

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COUNT THIRTY

(Conspiracy to Commit Money Laundering)

The Grand Jury further charges:

49. Paragraphs 1-40, 45 and 46 are reincorporated and realleged as if set forth in full herein.

50. From at least in or about May 2000 up to and including on or about May 14, 2002, in the Southern District of New York and elsewhere, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, money laundering, in violation of Title 18, United States Code, Sections 1956 (a) (1) (A) (i) , 1956 (a) (1) (B) (i) , 1956 (a) (2) (A) and 1956 (a) (2) (B) (i) .

51. It was a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra

Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, knowing that the property involved in certain financial transactions represented the proceeds of some form of unlawful activity, unlawfully, wilfully and knowingly, would and did conduct such financial transactions which in fact involved the proceeds of specified unlawful activity, to wit, bank fraud, wire fraud and mail fraud, with the intent to promote the carrying on of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

52. It was further a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay

Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, knowing that the property involved in certain financial transactions represented the proceeds of some form of unlawful activity, unlawfully, wilfully and knowingly, would and did conduct such financial transactions which in fact involved the proceeds of specified unlawful activity, to wit, bank fraud, wire fraud and mail fraud, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

53. It was further a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, unlawfully, wilfully and knowingly,

would and did transport, transmit and transfer monetary instruments and funds from a place in the United States to and through a place outside the United States and to a place in the United States from and through a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, to wit, bank fraud, wire fraud and mail fraud, in violation of Title 18, United States Code, Section 1956(a)(2)(A).

54. It was further a part and an object of the conspiracy that NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, unlawfully, wilfully and knowingly, would and did transport, transmit and transfer monetary instruments and funds from a place in the United States to and through a place outside the United States and to a place in the United States from and through a place outside the United States, knowing that the monetary instruments and funds involved in the transportation, transmission and transfer represented the proceeds of some form of unlawful activity and knowing that such

transportation, transmission and transfer were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(2)(B)(i).

The Means And Methods Of The Conspiracy

55. Among the means and methods by which NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, would and did carry out the conspiracy were the following:

a. As described above, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA,

a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and other co-conspirators fraudulently induced the Victim Banks to lend hundreds of millions of dollars based on sham metal trades that they falsely represented involved bona fide suppliers and purchasers of metal operating principally in India, Hong Kong, Singapore and the UAE. To conceal and disguise the ownership and control of the fraudulent loan proceeds, the defendants and their co-conspirators instructed some of the Victim Banks to transfer loan proceeds to Customers' accounts while concealing from the Victim Banks that the defendants and their co-conspirators controlled the Customers' accounts.

b. To promote their fraudulent scheme, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and one or more of their co-conspirators, diverted the loan proceeds they fraudulently obtained from one Victim Bank to make partial payments of the debt owed to another Victim Bank. The co-conspirators made it appear that the

purported buyers were paying for the metal they had purchased and induced the Victim Banks to continue to lend money, when in truth and in fact the purported buyers had not purchased or attempted to purchase any metal and had not intended to do so.

c. To conceal and disguise the ownership and control of the fraudulent loan proceeds, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, instructed some of the Victim Banks in the United States to transfer loan proceeds to the accounts of metal suppliers in India, Hong Kong, Singapore and the UAE to pay for the metal being purchased while concealing from the Victim Banks that the defendants and their co-conspirators controlled the Customers' accounts.

d. To promote their fraudulent scheme, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL

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RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, Anil Anand and Jaspreet Basra, a/k/a "Soniya Basra," co-conspirators not named as defendants herein, and others known and unknown, instructed Victim Banks in the United States to transfer loan proceeds to the accounts of purported metal customers in India, Hong Kong, Singapore and the UAE which were in fact controlled by one or more of the defendants and their co-conspirators. The defendants and their co-conspirators then transferred portions of these loan proceeds from accounts of foreign customers directly to the Victim Banks for repayment of previous loans or wired funds to Customers' accounts in the United States to be forwarded to the Victim Banks as loan payments.

Overt Acts

56. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On numerous occasions between 1995 and on or about May 14, 2002, in the Southern District of New York and elsewhere, in order to obtain loans from the Victim Banks, one or more co-conspirators established and maintained companies controlled by NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," the

defendant, and his co-conspirators, while representing themselves to be buyers or sellers in bogus non-ferrous metal transactions.

b. On numerous occasions between 1995 and on or about May 14, 2002, in New York, New York and elsewhere, one or more co-conspirators established and maintained bank accounts for purported metal companies that in reality RASTOGI and his co-conspirators controlled and that received loan proceeds from the Victim Banks.

c. On numerous occasions between 1995 and on or about May 14, 2002, in New York, New York and elsewhere, one or more co-conspirators caused loan proceeds from one or more of the Victim Banks to be wire transferred to bank accounts of purported metal companies that RASTOGI and his co-conspirators controlled.

d. On numerous occasions between 1995 and on or about May 14, 2002, in the Southern District of New York and elsewhere, one or more co-conspirators directed that loan funds fraudulently obtained from one Victim Bank be used to pay loans from other Victim Banks.

e. In or about 1998, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," the defendant, requested Anil Anand, a co-conspirator not named as a defendant herein, to recruit individuals to form nominee companies and pose as buyers or sellers of metal.

f. In or about July or August 1998, ASHOK SHAH, the defendant, filed papers with the State of California, forming LA Metals and LA Commodities.

g. In or about 1998, PRAVEEN SHARMA, the defendant, formed Garden State and Jersey Atlantic.

h. In or about 1998, SANJAY ROHIRA, the defendant, formed Esrod Metals and Sun Metal.

i. On or about April 19, 1999, AMIT NANGIA, the defendant, sent a letter to a co-conspirator not named as a defendant herein requesting certain financial information for Allied Deals-related companies in India.

j. In or about December 1999, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," the defendant, submitted incorporation documents to authorities of the State of New Jersey to form JRS Commodities.

k. On or about January 18, 2001, Esrod Metals transferred by wire approximately $97,585 from an account at First Union Bank to an account at National Bank in Los Angeles, California in the name of LA Metals.

l. On or about April 27, 2001, Jersey Metal wired from its Fleet Bank account in New York, New York, approximately $600,000 to Allied Deals' account at Chase Bank in New York, New York, to make payment on a loan issued to a Hong Kong company controlled by the defendants or one of their co-conspirators.

m. On or about May 2, 2001, a company in Hong Kong controlled by the defendants or their co-conspirators wired approximately $541,000 from an account in Hong Kong to LA Metals' account at National Bank in Los Angeles, California on behalf of Allied Deals PLC.

n. In or about September 2001, UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendant, faxed to Chase Bank in New York, New York, a letter concerning the non-payment of loans.

o. In or about November 2001, KAUSHIK AMIN, the defendant, applied for a bank loan from Fleet Bank on behalf of Kennedy Metal.

p. On or about November 26, 2001, UMESH MEISURIA, the defendant, sent a letter to NARENDRA KUMAR RASTOGI, the defendant, and Soniya Basra, a co-conspirator not named as a defendant herein, about MEISURIA's efforts to obtain a loan from Fleet Bank on behalf of Kennedy Metal.

q. On or about January 14, 2002, NAINA CHITRODA, the defendant, signed an invoice for a sale of cobalt from Allied Deals to Reliable.

r. On or about January 25, 2002, General Bank issued a loan for the sale of cobalt from Allied Deals to Reliable.

s. In or about March 2002, HENRY CHU, the defendant, traveled to Hong Kong, where he posed as an officer of Huntington Industries, a company based in Hong Kong controlled by one of the defendants or their co-conspirators.

t. On or about May 1, 2002, NIKHIL RASTOGI, the defendant, sent a fax to NARENDRA RASTOGI in connection with efforts to obtain financing on behalf of companies in Hong Kong affiliated with Allied Deals.

(Title 18, United States Code, Section 1956(h).)

FORFEITURE ALLEGATION AS TO COUNT ONE

57. As the result of committing the offense of conspiracy to commit bank fraud, mail fraud and wire fraud, in violation of Title 18, United States Code, Section 371, as alleged in Count One of this Indictment, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offense, including but not limited to the following:

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a. A sum of money equal to approximately $600,000,000 in United States currency, representing the amount of proceeds obtained as a result of the conspiracy offense for which the defendants are jointly and severally liable.

Substitute Assets Provision

b. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants —

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty; it is the intention of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property.

(Title 18, United States Code, Section 981; Title 28, United States Code, Section 2461; and Title 18, United States Code, Section 371.)

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* * *

FORFEITURE ALLEGATION AS TO COUNT THIRTY

27. As the result of committing the offense of money laundering conspiracy, in violation of Title 18, United States Code, Section 1956(h), as alleged in Count Thirty of this Indictment, NARENDRA KUMAR RASTOGI, a/k/a "Narendra Kumar," GAYA GAYATRINATH, HENRY CHU, JOBIELYNN SALUMBIDES, a/k/a "Lynn Salumbides," NAINA CHITRODA, MANOJ NIJHAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, a/k/a "Shazi Sattar," KAUSHIK AMIN, AMIT NANGIA and UDHAY SHANKAR BALAKRISHNA, a/k/a "Udhay Shankar," the defendants, shall forfeit to the United States pursuant to 18 U.S.C. § 982, all property, real and personal, involved in the money laundering conspiracy offense and all property traceable to such property, including but not limited to the following:

a. A sum of money equal to approximately $600,000,000 in United States currency, in that such sum in aggregate is property which was involved in the money laundering conspiracy offense or is traceable to such property for which the defendants are jointly and severally liable.

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Substitute Assets Provision

b. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants —

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty; it is the intention of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property.

(Title 18, United States Code, Section 982; and Title 18, United States Code, Section 1956(h).)

s/ Juan C. Arledge
FOREPERSON

s/ James B. Comey
JAMES B. COMEY
United States Attorney

APPENDIX C — EXCERPTED TRANSCRIPT OF JURY CHARGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 11, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 02 Cr. 673 RMB

UNITED STATES OF AMERICA,

v.

NARENDRA KUMAR RASTOGI, a/k/a Narendra Kumar, ANIL ANAND, JASPREET BASRA, a/k/a Soniya Basra, MANOJ NIJHAWAN, and UDHAY SHANKAR BALAKRISHNA, a/k/a Udhay Shankar,

S4 02 Cr. 673 RMB

NARENDRA KUMAR RASTOGI, GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, NAINA CHITRODA, MANOJ NIJAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, KAUSHIK AMIN, AMIT NANGIA, and UDHAY SHANKAR BALAKRISHNA,

Defendants.

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May 11, 2004
9:20 a.m.

Before:

HON. RICHARD M. BERMAN,

District Judge
and a jury

* * *

[2995] Let me repeat it again and say that there are two ways the government may satisfy this first element of bank fraud [2996] beyond a reasonable doubt. The first is by proving that the defendants and/or Miss Salumbides, in the case of the substantive count, agreed to execute or attempt to execute a scheme to defraud a bank; or by proving that they and/or she agreed to execute or attempt to execute a scheme to obtain a bank's money by false or fraudulent pretenses, representations or promises.

In order to establish the existence of a scheme, the government is not required to establish that the scheme actually succeeded; that is, that a schemer realized any gain from the scheme or that the intended victim suffered any loss. The issue is whether there was such a scheme, thus it's not necessary for the government to prove that the scheme succeeded, just that the scheme was devised and employed.

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If you find that the government has sustained its burden of proof that a scheme to defraud a bank or to obtain money by false pretenses did exist as charged, then you go to the second element. The second element of bank fraud is as follows:

To meet its burden of proof with respect to the bank fraud, the second element that the government must prove beyond a reasonable doubt is that a defendant executed, attempted to execute or participated in the scheme knowingly, willfully and with specific intent to defraud the bank or to obtain money owned or possessed by the bank or under the bank's custody or [2997] control.

To act with "intent to defraud" means to act willfully and with intent to deceive for the purpose of causing some financial loss to another; and here, to deprive the bank of money or of property. However, the government need not prove that the intended victims were actually harmed, only that such harm was contemplated. While the success of the scheme is not an element of the crime, proof that people were actually victimized may be good evidence of the schemer's intent to defraud.

The government is not required to prove that the defendant you are considering intended permanently to deprive the banks of their property or that the banks suffered the loss or that the defendant personally profited from his or her acts. It is sufficient if the defendants intended through the scheme to defraud or to obtain the use of the victims' property, the victims'

money or property for a period of time, even if they ultimately intended to return it or if the defendants intended to obtain the use of the victims' money or property by deliberately depriving them of information that was material to their decision on how to use or invest their money or property.

However, if you find that the defendant you are considering did not intend to deprive the banks of their property or if the bank suffered no loss or that the defendant did not profit by his or her acts, you may consider this [2998] evidence in determining whether he or she had the intent to injure or defraud the banks.

* * *

[3006] Okay. Now, we are still talking about the first conspiracy. We have now talked about the first object, bank fraud, both as an object of the conspiracy and as a substantive count with respect to Ms. Salumbides.

Let's just talk about mail fraud and wire fraud, which are the second and third objects of that first conspiracy, and then we will take a little break. All right? So then you will have all of the instructions with respect to the first conspiracy before the break, and take a little break, and then we will come back and talk about the money laundering and the remaining instructions.

So, let's talk about the second object of first conspiracy, which is mail fraud.

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The second object of the first conspiracy is to commit mail fraud. The mail fraud statute is Section 1341 of Title 18 of the United States Code. And it provides in pertinent part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice or attempting to do so, knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is directed to be delivered by the person to whom it [3007] is addressed, any such matter or thing shall be guilty of a crime.

That is the statute, quoting from the statute. I'm going to explain what that statute means in a second, but now explaining the elements of mail fraud.

In order to establish the mail fraud object of the first conspiracy, the government must establish beyond a reasonable doubt the following four elements:

First, that at or about the time alleged in the indictment there was a scheme or artifice to defraud or to obtain money or property by false and fraudulent pretenses, representations, or promises.

By the way, as I do this, you are going to see that many of the phrases are now familiar to you from talking about bank fraud. That is the first element of mail fraud.

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Second, that the scheme or artifice to defraud or the false statements and representations concerned material facts.

Third, that the defendants knowingly and wilfully devised or participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud, and,

Fourth, that the United States mails or a commercial carrier was used in furtherance of the scheme as specified in the indictment.

Thus, in order for you to convict you must find beyond [3008] a reasonable doubt the existence of a scheme — to convict as to mail fraud, the existence of a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises. You must find that the scheme or artifice or the false statements and representations concerned material facts. You must also find that the defendant you are considering devised or participated in the fraudulent scheme knowingly, wilfully, and with intent to defraud. And in making these determinations, you should rely on the definitions I gave you with respect to the instructions relating to bank fraud.

But anyway, I'm going to go into each of the elements of mail fraud now specifically, the first element of mail fraud.

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The first element the Government must prove beyond a reasonable doubt is that at or about the time alleged in the indictment there was a scheme or artifice to defraud or to obtain money or property by false or fraudulent — and fraudulent pretense, representations or promises.

And now I will define some of those terms for you.

The language describing this first element is almost self-explanatory. A "scheme or artifice" is simply a plan for the accomplishment of an object. A "scheme to defraud" is any plan, device or course of action to deprive another of money or property by means of false or fraudulent pretenses, [3009] representations or promises. It is a plan to deprive another of money or property, by trick, deceit, deception, swindle or overreaching.

"Fraud" is a general term which embraces all the various means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

A "pretense, representation or promise" is fraudulent if it was made falsely and with the intent to deceive. A statement may be also fraudulent if it contains half-truths or if it conceals material facts in a manner that makes what is said or representations deliberately misleading.

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It is not necessary for the Government to establish that any particular person actually relied on, or actually suffered damages as a consequence of, any fraudulent representation or concealment of facts. Nor need you find that the defendant you are considering profited from the fraud. It is enough if you find that a false same, or a statement omitting material facts that made what was said deliberately misleading, was made as part of a fraudulent scheme in the expectation that it would be relied upon. You must concentrate on whether there was such a scheme, not on the consequences of the scheme.

In addition to proving that a statement was false or [3010] fraudulent, in order to establish a scheme to defraud, the Government must prove that the alleged scheme contemplated economic harm by depriving another of money or property.

As in the case of bank fraud, the Government is not required to establish with respect to mail fraud that anyone relied on, or actually suffered damages as a consequence of any false statement or omission of any material fact. Nor is it necessary for the Government to establish that the scheme actually succeeded, that is, that any defendant realized any gain from the scheme or that the intended victim suffered any loss. So that is element number one of mail fraud.

The second element of mail fraud is what we call materiality. The scheme or artifice to defraud or the false or fraudulent representations or concealment must relate to a material fact or matter. A material fact is one

that, we talked about this before, that would have been significant to a reasonable and prudent person in relying on the representation or statement or the failure to disclose in making a decision. So that means if you find a particular statement or matter was false and that it concealed facts that made what was said deliberately misleading, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision.

And then third element now of mail fraud that the Government must establish beyond a reasonable doubt is that the [3011] defendants devised or participated in the fraudulent scheme knowingly, wilfully, and with the intent to defraud.

I have already talked about "knowingly" and "wilfully". You should use those same definitions.

The words "devised" and "participated" are words that you are familiar with, and I don't have to sped much time talking to you about those. To "devise" a scheme to defraud is to concoct it or plan it. To "participate" in a scheme to defraud means to associate oneself with a view or intent toward making it succeed. While a mere onlooker is not a participant in a scheme to defraud. it is not necessary that a participant be someone who personally and visibly executes the scheme to defraud.

It is also not required that the defendant you are considering participate in or have knowledge of all of the operations of the scheme. The guilt of the defendant

you are considering is not governed by the extent of the defendant's participation.

As in the case of bank fraud, it is also not necessary that the defendant you are considering participated in the alleged scheme from the beginning. And moreover, even if the defendant you are considering participated in the scheme to a lesser degree than others, he or she is nevertheless equally guilty as long as the defendant you are considering became a member of the scheme to defraud with knowledge of its general [3012] scope and purpose.

And now we come to the fourth element of mail fraud, the fourth and final element I might add, of mail fraud that the Government must establish as to the mail fraud object is the use of the mails in furtherance of the fraudulent scheme.

Here it is not necessary that any one of the conspirators be directly or personally involved in the use of the mails or have had anything whatsoever to do with the mails, so long as the mailing is reasonably foreseeable in the execution of the scheme to defraud in which the defendant is accused of participating.

In this connection, it would be enough to establish this element of the crime if the evidence justifies a finding that the defendant caused the mailing by others; and this does not mean that the defendant himself or herself must specifically have authorized others to do the mailing. This mailing requirement can be satisfied

even if the mailing was done by the person being defrauded or some other innocent party. When the person does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen by that person, even though he or she does not actually intend such use of the mails, then he or she nevertheless causes the mails to be used. Incidentally, the mailed matter need not itself be fraudulent. For example, the mailed matter need not contain [3013] any fraudulent representations and indeed could be completely innocent.

With respect to the use of the mails, the Government must prove beyond a reasonable doubt that a particular mailing charged in the indictment happened. However, the Government does not have to prove that any particular use of the mails was made on the exact date charged in the indictment. As I mentioned before, it is sufficient if the evidence establishing beyond a reasonable doubt that a particular use of the mails charged in the indictment occurred on a date that was substantially similar to that date charged in the indictment.

So one more little section before our break. Wire fraud.

Remember we said the first conspiracy had three objectives: Bank fraud, which we have done now; mail fraud, which we just finished; and now wire fraud.

Appendix C

The third objective of this first conspiracy is wire fraud. The defendants are alleged to have conspired to violate what's called Section 1343 of Title 18 of the United States Code, and that section, which is the wire fraud section of the statute, provides in part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be [3014] transmitted by means of wire, radio or television communications in interstate, or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be guilty of a crime.

That is the statute. Now I will briefly talk about the elements of wire fraud, because as we go along, some of the elements are, entail concepts with which you have already become familiar.

In order to establish the wire fraud object of the conspiracy, the Government must establish beyond a reasonable doubt that two or more co-conspirators agreed as follows:

First, that there was a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses, representations, or promises.

Second, that the scheme and artifice and false statements and representations concerned material facts.

Third, that they would act knowingly and wilfully to devise or participate in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud; and

Fourth, that in the execution of that scheme, they would use or cause the use of interstate or foreign wires. Hence, wire fraud.

Let's talk about the elements for a minute.

The first, second and third elements of wire fraud are [3015] identical, you will be happy to hear, to the first, second and third elements of mail fraud. Thus, in order to convict you must find beyond a reasonable doubt the existence of a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises. You must find that the scheme or artifice or the false statements and representations concerned material facts. And you must also find that the defendant you are considering devised or participated in the fraudulent scheme knowingly, wilfully, and with the intent to defraud. In making these determinations, you should rely on the instructions I gave you with respect to the very same elements under the mail fraud sections as well as the definitions I gave you with respect to the terms when we talked about bank fraud.

Appendix C

The fourth element, let's talk about that for just a minute, and then we will take a break.

The fourth and final element that the Government must establish as to the wire fraud element is that it was agreed that interstate or foreign wire facilities would be used in furtherance of the scheme to defraud.

The wire communication must pass between two or more states, or between a foreign country and the United States.

It is not necessary that any one of the conspirators be directly or personally involved in any wire communication, as long as the communication is reasonably foreseeable in the [3016] execution of the alleged scheme to defraud, that is, within the scope of the agreement to commit the unlawful object of wire fraud. When one does an act with knowledge that the use of the wire will follow in the ordinary course of business, or where such use of the wires can reasonably be foreseen, even though not actually intended, one causes the wires to be used. Incidentally, this wire communication requirement is satisfied even if the wire communication was or would be done by a person with no knowledge of the fraudulent scheme, including a victim of the alleged fraud.

The use of the wire need not itself be fraudulent. Stated another way, the material wired need not contain any fraudulent representation, or even any request for money. It is sufficient if the wires were used to further or assist the carrying out of the scheme to defraud.

Appendix C

One way in which a wire may be used to further or assist in carrying out a scheme to defraud is if it was particularly designed to lull the victim of fraud into a false sense of security, postpone the victim's ultimate complaint to the authorities and thereby make the apprehension of the defendant you are considering less likely than if the communication had not taken place.

The Government must establish beyond a reasonable doubt the particular use, wire use charged in the indictment. However, the Government does not have to prove that the wire [3017]was used on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wire was used on a date reasonably near the date alleged in the indictment.

Finally, if you find that the wire communication was reasonably foreseeable and that interstate or international wire or radio communication charged in the indictment took place, then this element is satisfied even if it was not foreseeable that the wire communication would cross state or national line boundaries.

* * * *

APPENDIX D — SENTENCING AGREEMENT DATED AUGUST 18, 2004

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

August 18, 2004

John S. Furlong, Esq.
Furlong & Krasny
Mountainview Office Park
820 Bear Tavern Rd, Suite 304
West Trenton, N.J. 08268

Re: *United States v. Manoi Nijhawan*
S4 02 Cr. 673 (RMB)

Dear Mr. Furlong:

On May 12, 2004, Manoj Nijhawan ("the defendant") was found guilty, following a jury trial before the Honorable Richard M. Berman, to Counts One and Thirty of the above-referenced superseding indictment (the "Indictment"). Count One of the above-referenced Indictment charges the defendant with conspiracy to commit bank fraud, mail fraud and wire fraud, in violation of Title 18, United States Code, Section 371, in connection with a scheme, from in or about 1998 through

on or about May 14, 2002, to defraud various United States and foreign financial institutions. Count One carries a maximum sentence of five years' imprisonment; a maximum term of three years' supervised release; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to a person other than the defendant as a result of the offense; and a mandatory $100 special assessment.

Count Thirty of the Indictment charges the defendant with conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h), in connection with the laundering of proceeds derived from the scheme charged in Count One. Count Thirty carries a maximum sentence of twenty years' imprisonment; a maximum term of five years' supervised release; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $500,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to a person other than the defendant as a result of the offense; and a mandatory $100 special assessment. In addition to the foregoing, the Court must order restitution in accordance with Sections 3663, 3663A and 3664 of Title 18, United States Code, in connection with the sentencing for Counts One and Thirty of the Indictment.

The parties stipulate that Nijhawan's sentence is governed by the United States Sentencing Commission Guidelines Manual, dated November 1, 2001, and,

pursuant to U.S.S.G.§ 6B1.4, hereby stipulate to the following:

A. *Offense Level*

1. The United States Sentencing Guidelines provision applicable to Count One is § 2B1.1.

2. The United States Sentencing Guidelines provision applicable to Count Thirty is § 2S1.1.

3. Counts One and Thirty are to be grouped together for the purposes of U.S.S.G. § 3D1.2(b), because these counts involve the same victims and multiple acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

4. The offense level applicable to that group is calculated using the most serious of the counts in the group; that is, the count that yields the highest offense level of the counts in that group. U.S.S.G. § 3D1.3(a). The count that yields the highest offense level is Count Thirty.

5. The base offense level under U.S.S.G. § 2S1.1(a)(1) is the offense level for the underlying offense from which the laundered funds were derived because in this case the defendant committed the underlying offense and the offense level for the offense can be determined.

6. The underlying offense is conspiracy to commit bank fraud, mail fraud and wire fraud, in violation of 18 U.S.C. §§ 371, 1341, 1343 and 1344. The applicable guideline for the underlying offense is § 2B1.1.

7. The base offense level under § 2B1.1 is six. U.S.S.G. § 2B1.1 (a).

8. Because the loss from the offense exceeds $100 million, the offense level is increased 26 levels. *See* U.S.S.G. § 2B1.1(b) (1) (N).

9. A two-level increase is warranted under U.S.S.G. § 2B1.1(b)(2)(A)(i) because the scheme involved more than 10, but fewer than 50, victims.

10. A two-level increase is warranted under U.S.S.G. § 2B1.1(b)(8) because a substantial part of the fraudulent scheme was committed from outside the United States and the offense otherwise involved sophisticated means.

11. A two-level increase is warranted under U.S.S.G. § 2S1.1(b)(2)(B) because the defendant is convicted under 18 U.S.C. § 1956.

In accordance with the above, the applicable Guidelines offense level is 38.

Appendix D

B. *Criminal History*

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history points. Accordingly, the defendant is in Criminal History Category I.

C. *Sentencing Range*

An offense level of 38 and a Criminal History Category of I yields a sentencing range of 235 to 293 months (the "Stipulated Sentencing Guidelines Range"). After determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 38, the applicable fine range is $25,000 to $1,000,000.

The defendant may seek a downward departure of up to, but not more than, 16 levels from the Sentencing Guidelines range set forth above, only under U.S.S.G. § 2B1.1 comment. (n. 15(B)), on the ground that the loss overstates the seriousness of the offense. If the Court grants a 16-level departure on that ground, the resulting offense level would be 22, and the Sentencing Guidelines range would be 41 to 51 months (Zone D). The Government reserves the right to oppose such a departure motion.

The parties agree that, other than a departure of up to 16 levels under U.S.S.G. § 2B1.1 comment. (n. 15(B)), as discussed above, no other downward or upward departure from the stipulated Sentencing Guidelines range of 235 to 293 months is warranted. Accordingly, neither party will seek such a departure or seek any adjustment not set forth herein. Nor will either party suggest that the Probation Department consider

such a departure or adjustment, or suggest that the Court *sua sponte* consider such a departure or adjustment. The parties understand that this Agreement reflects the special facts and circumstances of this case and is not intended as precedent for any other case.

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Department or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Sentencing Guidelines Range set forth above (or such other range as the Court may determine) the defendant should be sentenced; (iii) to seek an appropriately adjusted Sentencing Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above. Nothing in this agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, and/or imposition of an adjustment for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Department nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the

proper Guidelines to apply to the facts. In the event that the Probation Department or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his agreement to this agreement should the sentence imposed by the Court be outside the Stipulated Sentencing Guidelines Range set forth above.

By entering this agreement, the defendant agrees to waive all constitutional challenges to the United States Sentencing Guidelines. Specifically, the defendant waives any right to have facts that the law makes essential to punishment either (i) charged in an information or indictment, (ii) proven to a jury, or (iii) proven beyond a reasonable doubt. The defendant explicitly consents to be sentenced pursuant to the applicable Sentencing Guidelines and to have his sentence imposed (including any enhancements, adjustments and departures) based on facts to be found by the sentencing judge by a preponderance of the evidence. The defendant explicitly acknowledges that his entry into this Agreement authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence, that

is authorized by the Sentencing Guidelines. The defendant understands that, in determining the applicable Sentencing Guidelines, the sentencing court may consider any reliable evidence, including hearsay.

It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Sections 2241 and/or 2255, any sentence within or below Sentencing Guidelines Ranges set forth above (*i.e.*, 41 to 293 months) and (ii) that the Government will not appeal any sentence within or above the Sentencing Guidelines Ranges set forth above (41 to 293 months). This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.

By entering into this Agreement, the defendant waives any and all right to withdraw his consent to this Agreement or to attack his conviction at trial on Counts One and Thirty of the Indictment, either on appeal or collaterally.

It is further agreed that should the defendant's conviction be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may

be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

The Government agrees that it has no evidence that Manoj Nijhawan received any cash or other compensation other than his on-the-books salary for his participation in the scheme charged in Counts One and Thirty of the Indictment.

Appendix D

The parties understand that this Agreement reflects the special facts of this case and is not intended as precedent for other cases.

Very truly yours,

DAVID N. KELLEY
United States Attorney

By: s/ Marcus A. Asner
MARCUS A. ASNER
Assistant United States Attorney
(212) 637-2483

APPROVED:

s/ Jonathan N. Halpern
JONATHAN N. HALPERN
Chief, Major Crimes Unit

AGREED AND CONSENTED TO:

s/ Manoj Nijhawan — 8-25-04
MANOJ NIJHAWAN — DATE

APPROVED:

s/ John S. Furlong — 8-25-04
JOHN S. FURLONG, ESQ. — DATE
Attorney for
MANOJ NIJHAWAN

APPENDIX E — EXCERPTED TRANSCRIPT OF SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 25, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 02 Cr. 673 RMB

UNITED STATES OF AMERICA,

v.

NARENDRA KUMAR RASTOGI, a/k/a Narendra Kumar, ANIL ANAND, JASPREET BASRA, a/k/a Soniya Basra, MANOJ NIJHAWAN, and UDHAY SHANKAR BALAKRISHNA, a/k/a Udhay Shankar,

S4 02 Cr. 673 RMB

NARENDRA KUMAR RASTOGI, GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, NAINA CHITRODA, MANOJ NIJAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, KAUSHIK AMIN, AMIT NANGIA, and UDHAY SHANKAR BALAKRISHNA,

Defendants.

Appendix E

August 25, 2004
9:35 a.m.

Before:

HON. RICHARD M. BERMAN,
District Judge

DAVID N. KELLEY,
United States Attorney for the Southern District of New York
MARCUS A. ASNER,
Assistant United States Attorney

FURLONG AND KRASNY,
Attorneys for defendant Manoj Nijhawan
BY: JOHN S. FURLONG, Esq.

[2] (Case called)

THE COURT: So, we are on today for sentencing. And ordinarily I have received and reviewed, first of all, the updated or new letter agreement between the government and the defense dated August 18, 2004, I believe, and which I understand has been executed by both sides. I'm not sure if the date of execution of the letter is the same as on the front page. Maybe a little more recent.

MR. FURLONG: This morning, your Honor.

Appendix E

THE COURT: So it's executed as of today's date, August 25, 2004?

MR. FURLONG: That's correct, your Honor.

THE COURT: And that agreement, which we're going to talk about a little further in considerable more detail in a minute, says that the parties agree to go forward with sentencing today despite the fact that there are some issues surrounding the United States sentencing guidelines, sort of legal issues. It says a lot of other things, too, which we'll touch on.

And in that connection I've asked, and in situations like this have been asking the parties, more particularly the defendant, to sign a waiver document that I've prepared which raises some of the issues that we'll raise in the course of an allocution; and in particular, which waives any challenges to the sentencing guidelines, including any of those that might [3] stem from the case of Blakely vs. Washington.

And, Mr. Furlong, you and Mr. Nijhawan have signed that document today as well, is that right?

MR. FURLONG: That is accurate, your Honor.

THE COURT: So I think maybe we can start by swearing in Mr. Nijhawan. I think I'm going to go through an allocution based on this revised agreement.

(Defendant sworn)

THE COURT: And just preliminarily, Mr. Furlong, so it's clear to me and clear in the record, under the

sentencing guidelines as they are currently in force, the offense level in this case was computed at 38, criminal history category was I, or is I, and that sentencing — could give rise to a sentencing guideline range, assuming there were no deductions or departures or anything, of 235 to 293 months based on the jury verdict in this case.

And the net net, and we'll get to the net net in a little while, but in light of this waiver that you've signed and Mr. Nijhawan has signed and the agreement with the government, there is the possibility for an application for a downward departure in this case to which the government has indicated that it intends to take no position — not oppose it, not support it, but to take no position — which, if granted, would lower the offense level to 22 and which in turn would give rise to a sentencing range of 41 months to 51 months.

[4] And so I take it that the whole point of this new agreement and the waiver of the Blakely issues, etc., is because you and Mr. Nijhawan, having discussed this matter, have agreed that this is the way he wishes to go, understanding that the low end of that range is 41 months and there would be a prison sentence imposed upon him of 41 months, which, among other things, he would not be able to appeal and/or challenge.

Is that — do I understand correctly what it is that defense and the government are seeking to accomplish in this case?

MR. FURLONG: In a word, yes, your Honor.

THE COURT: OK.

MR. FURLONG: If the Court will permit, can I spread a little more on the record to that.

THE COURT: Sure. There will be other chances, too, but sure.

MR. FURLONG: I want to put a couple things procedurally in order. As a result of our execution of that agreement, which Mr. Nijhawan and I have discussed at great length and discussed with the government at great length, I hereby withdraw our Rule 29 motion for a new trial with respect to Count 30.

Secondly, I withdraw my specific application to sentencing. The Court will recall I submitted a fairly substantial brief with respect to the Blakely arguments and [5] issues, such as whether we would be entitled to a sentencing jury or base offense level, a variety of challenges. All of those are withdrawn.

In addition, I had asked the Court to consider an application under the guidelines post Mincey, M-I-N-C-E-Y, for foreseeability determination. And for reasons I placed in my letter to the Court yesterday, I would also like to withdraw that application.

And I appreciate the Court will give me an opportunity down the line. What infuses a lot of my parsed language is my sensitivity to some immigration consequences of all of this, your Honor. We're not

challenging the adjusted offense level for the entire scheme as defined by the presentence report because we're looking to reserve on the issue of dollar amounts for another day.

THE COURT: And another forum.

MR. FURLONG: And another forum, another tribunal. I hope that that's what I wrote in my letter and Mr. Nijhawan's letter by suggestion before I submitted it to the Court.

And I guess what I'm asking the Court to do is to append that 8/18 agreement signed today to the PSR, to the record. Mr. Asner's follow-up letter of August 23rd, as amended for typographical errors, although he insists the footnote call my —

[6] THE COURT: Slow it down a bit.

MR. FURLONG: Your Honor, the record should reflect that the court reporter won the contest this summer for fastest court reporter, as she told me right before your Honor took the bench.

THE COURT: Flattery will get you, I don't know, probably everywhere, I guess, in this case.

MR. FURLONG: Your Honor, what I said was that I asked that Mr. Asner's 8/23 letter and my response to the Court, 8/24 — that's the letter I faxed over to your Honor yesterday with Mr. Nijhawan's letter — that that

all be made part of the presentence report appendix for the very reasons expressed in my letter.

THE COURT: OK.

MR. FURLONG: Thank you, your Honor.

THE COURT: And it was my sort of summary understanding of the government as well in this case, Mr. Asner?

MR. ASNER: Yes, your Honor.

THE COURT: OK. Then, Mr. Nijhawan, I'm going to ask you a few questions.

First, you understand that having been sworn and under oath, your answers to my questions must be truthful and would be subject to the criminal penalties of perjury or of making a false statement if you did not answer truthfully, you realize [7] that?

THE DEFENDANT: I know, your Honor.

THE COURT: OK. So referring for a moment to these documents we've talked about, Mr. Nijhawan, before I enter the sentence I want to ask you a series of questions so that I can establish to my satisfaction that you have, in fact, entered this sentencing stipulation, this letter agreement knowingly and voluntarily.

Appendix E

If you don't understand any of my questions or at any time you wish to consult with your attorney for any reason, please say so and I'll give you as much time as you need to consult with counsel, because it's essential to a knowing and voluntary understanding of that document that you also understand every question before you answer.

So let me start by asking you to state your full name.

THE DEFENDANT: My full name is Manoj Nijhawan, first name is spelled M-A-N-O-J, last name is spelled N-I-J-H-A-W-A-N.

THE COURT: How old are you?

THE DEFENDANT: I am forty-five years old, your Honor.

THE COURT: You are a citizen of our country?

THE DEFENDANT: No. I am a citizen of India.

THE COURT: But you're a permanent resident of the United States, do I understand that correctly?

THE DEFENDANT: Yes, your Honor.

[8] THE COURT: And how far do you go in school?

THE DEFENDANT: I finished my bachelors undergraduate in business, and I took my CPA exam in late '80s.

THE COURT: And are you now or have you recently been under the care of a medical doctor?

THE DEFENDANT: No, just for my — just for routine matters, like cold or allergy, but nothing —

THE COURT: Right. And what about a mental health physician, are you seeing a mental health —

THE DEFENDANT: No, I'm not.

THE COURT: And how is your physical health, generally speaking?

THE DEFENDANT: My physical health is all right, your Honor.

THE COURT: And your mental health?

THE DEFENDANT: That's also fine.

THE COURT: And have you ever been addicted to drugs or to alcohol?

THE DEFENDANT: No, your Honor.

THE COURT: Have you ever been hospitalized or treated for any addictions?

THE DEFENDANT: No, your Honor.

THE COURT: And have you taken any drugs or medicine or pills or drunk any alcohol beverages in the past 24 hours?

THE DEFENDANT: Except for probably a sleeping pill, [9] you know.

THE COURT: OK. Nothing, though, that would impact your frame of mind today or your ability to answer my questions?

THE DEFENDANT: No, your Honor.

THE COURT: And you understand what's happening in today's proceeding here in court?

THE DEFENDANT: I fully understand, your Honor.

THE COURT: Here's a question for the lawyers: Do either of you have any concerns or doubts as to Mr. Nijhawan's competence in this case to enter into this sentencing stipulation?

MR. FURLONG: None, your Honor.

MR. ASNER: No, your Honor.

THE COURT: Nor do I. Based on the record today including Mr. Nijhawan's testimony, I find that he is fully competent to enter into this sentencing stipulation, which is the document dated August 18, 2004.

Mr. Nijhawan, have you had a full opportunity to discuss with Mr. Furlong all aspects of your case, including of course, this sentencing stipulation and the submissions he's made to the Court; and including, in fact, how the sentencing guidelines would apply to your case; and even including the recent challenges to the sentencing guidelines, including this court case that I've been referring to called Blakely vs. [10] Washington?

THE DEFENDANT: I fully discussed all these issues and matters with my attorney.

THE COURT: OK. And do you understand also, just jumping ahead, that as I asked Mr. Furlong before, the net or the conclusion of these various documents, if I go along with your applications, is that you would nevertheless be facing a prison sentence of 41 months at the low end?

THE DEFENDANT: I understand.

THE COURT: And I say that because of — it's obvious that's the legal conclusion from these papers, but I also say that because I've received in your case, as I often do, so many letters that are very supportive of you and touching, in fact, from family members.

But I want to make sure that you and they understand what the nature of this proceeding is and what you and Mr. Furlong have agreed would be the likely outcome of this sentencing procedure.

THE DEFENDANT: Yes, your Honor. Myself and my family, we all understand the nature of these proceedings.

THE COURT: All right. Now, you have, of course, I assume, reviewed a copy of the indictment in this case, which has the charges against you and you are familiar with the trial proceeding that we had and the outcome of that proceeding. And, again, you have reviewed, I'm sure, the August 18, 2004, [11] sentencing stipulation with Mr. Furlong, have you?

THE DEFENDANT: Yes, your Honor.

THE COURT: And have you discussed fully with him, again, in light of the fact that following trial you were found guilty of certain counts, what the implications of all of these papers we've talked about would be for your sentencing?

THE DEFENDANT: Yes, your Honor.

THE COURT: And are you fully satisfied with Mr. Furlong's — first of all, with the legal representation he's given you in this matter?

THE DEFENDANT: Yes, your Honor.

THE COURT: And are you fully satisfied with the legal advice that he's given you with respect to all phases of this case, and most particularly with respect to the sentencing phase?

THE DEFENDANT: Yes, your Honor.

THE COURT: And are you aware that as a result of the jury finding, there were two offenses as to which you'd been found guilty: One is conspiracy to commit bank fraud, mail fraud and wire fraud; and another is a conspiracy to commit money laundering. Do you realize that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you realize that with respect to the first conspiracy you could face a maximum term of imprisonment of five years?

[12] THE DEFENDANT: Yes, your Honor.

THE COURT: And with respect to the second conspiracy you could face a maximum term of imprisonment of 20 years?

THE DEFENDANT: Yes, sir.

THE COURT: So combined you would face 25 years of imprisonment, do you realize that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you realize I myself am not fully familiar with the immigration laws so I don't know how they might apply to a resident alien, but do you realize that as I understand it, as a noncitizen it's

possible that you could face some deportation proceedings at the conclusion of this case?

THE DEFENDANT: I understand that, your Honor.

THE COURT: OK. Now, with respect to the sentencing guidelines, just a few more questions. First of all, you have discussed how the sentencing guidelines may be applied in your case?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you agree, do you, to have your sentence determined pursuant to the sentencing guidelines?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you agree to waive all constitutional challenges to the validity of the sentencing guidelines?

[13] THE DEFENDANT: Yes, your Honor.

THE COURT: And are you aware that there is a case pending in the Supreme Court which will consider whether the guidelines are subject to constitutional challenge or not?

THE DEFENDANT: I'm aware of the case of Blakely vs. Washington, your Honor.

THE COURT: And do you waive your rights to have facts that might determine the offense level under the guidelines, including facts that could support any specific characteristic or other enhancement or adjustment alleged in the indictment, found by a jury beyond a reasonable doubt? In other words, do you agree to waive a subsequent proceeding in which a jury would have to find those kinds of facts that I just referred to?

THE DEFENDANT: Yes, your Honor.

THE COURT: OK. And do you agree that it is in your view OK, or that is to say, I'm authorized as the sentencing judge to determine the facts and the offense level here at sentencing by a preponderance of the evidence as opposed to beyond a reasonable doubt?

THE DEFENDANT: I understand, your Honor.

THE COURT: So let's just give you a hypothetical example once again to talk a little bit about the guidelines. Suppose — well, we know in this case what the guidelines say. The guidelines say that the guideline range is 235 to 293 [14] months. Do you realize that?

THE DEFENDANT: I understand that.

THE COURT: And they say that the offense level is 38 and the criminal history category is I. You realize that?

THE DEFENDANT: Yes, I do.

THE COURT: And do you realize that if — and I might just indicate, you know, up front that I do intend to grant the downward departure application. If I do that, then the offense level is 22 and you still face a guideline range of 41 months to 51 months of incarceration. Do you realize that?

THE DEFENDANT: Yes, I realize that, your Honor.

THE COURT: And do you realize that even if you don't like the sentence that I impose, you would still not be able to ignore this stipulation that you entered dated August 18 on the front page and signed today, August 25, 2004? Do you realize that?

THE DEFENDANT: I realize that, your Honor.

THE COURT: Then, once again, I'm going to ask you first, Mr. Furlong, and then Mr. Nijhawan, whether you are intending to waive any of the challenges to my proceeding to sentence under the sentencing guidelines as they are currently in full force and effect?

MR. FURLONG: I do, your Honor.

THE DEFENDANT: I do, your Honor.

THE COURT: OK. And do you think, Mr. Nijhawan, that [15] you fully understand the consequences of entering into this stipulation today?

THE DEFENDANT: I fully understand the consequences of entering into this stipulation, your Honor.

THE COURT: Has anybody threatened you or in any way forced you to enter into this stipulation?

THE DEFENDANT: No, your Honor, nobody has forced me.

THE COURT: And, again, you've gone over it and its consequences fully with Mr. Furlong?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, this letter agreement speaks for itself. It's between the government and the defense and it provides, among other things, the following: First of all, it says that the sentence is governed by the sentencing guidelines. It says that the loss in this case exceeds $100 million. It says that the scheme involved more than 10 but fewer than 50 victims. It says that a substantial part of the fraudulent schemes that were addressed at the trial occurred from outside the United States.

It says that the parties agreed that the applicable sentencing guidelines offense level was 38 and the range, therefore, will be 235 to 293 months. It also says that the defendant may and has indicated that he does seek a downward departure of up to but not more than 16 levels, which would be from 38 to 22. And that

departure application could be based [16] on the fact that the loss overstates the seriousness of the offense. And it also concludes, as we have discussed, that if there were such a departure, the guideline range would then be 41 to 51 months. It further says that the parties agree that no other departures, upward or downward, will be sought.

And then it also includes, among other things, a waiver of appeal. And it says that the defendant agrees not to appeal or otherwise litigate under 28 United States Code, Sections 2241 or 2255 any sentence that's within or below that guideline range of 41 to I guess 293 months. And it also says that the defendant agrees to waive all rights to withdraw his consent to this agreement dated August 18, 2004, and signed today or to attack his conviction or sentence either on appeal or collaterally.

It may say some other things, it sure does, but those are the key things I want to bring to your attention. Is that clear, Mr. Furlong, that agreement?

MR. FURLONG: It is, your Honor.

THE COURT: And is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: How about the government?

MR. ASNER: Yes, sir.

THE COURT: Has anybody made any promise or inducement to you, Mr. Nijhawan, to cause you to enter into this stipulation?

[17] THE DEFENDANT: No, your Honor.

THE COURT: Has anybody made any promise to you as to what your sentence will be in this case?

THE DEFENDANT: No, your Honor.

THE COURT: OK. So, let's proceed then to the sentencing.

It is my conclusion that this sentencing stipulation has been entered into knowingly and voluntarily. It's also my conclusion that the defendant has knowingly and voluntarily entered into a waiver of his appeal rights, both in the agreement and sentencing stipulation as well as in today's allocution.

So, please be seated. Mr. Furlong, in addition to the materials described, I've also reviewed the presentence report in this case dated August 18, 2004, along with an addendum of that date and a sentencing recommendation of that date. I've reviewed a series of correspondence both from you and from the government in response.

Hold on one second.

(Pause)

THE COURT: It's not clear to me that we've seen a letter that was dated August 24, which may be — I don't know if it's from the government or Mr. Furlong.

Mr. Furlong, I think that might be your letter.

MR. FURLONG: Your Honor, this was faxed over to your [18] Honor yesterday. It may have come in too late for everyone's consideration.

THE COURT: Well, I think I got it this morning. I just want to make sure it's something I looked at. I did see this, this also —

MR. FURLONG: I've attached to that Mr. Nijhawan's letter to the Court.

THE COURT: I did read that letter this morning. I did see that. OK. And I've also received and reviewed the many, as I said before, moving letters, and I find them to be helpful, from the defendant's family members, including several from his wife. And they attest to Mr. Nijhawan's good character and standing in his community as well as his family.

And did you go over all those materials with Mr. Nijhawan before today?

MR. FURLONG: I did, your Honor.

THE COURT: And do you have any objections to those materials, apart from anything that's reflected in the letters you've submitted to me?

MR. FURLONG: I have a very brief issue, your Honor, with a couple of areas of the presentence report, if I might. And I appreciate what the Court is saying and my comments will be relatively brief, your Honor.

THE COURT: OK.

MR. FURLONG: First, I think I emphasized already, and [19] I don't want to go over it again, specifically paragraph 54 of the presentence report. While the government contends and reserves the right to argue that the loss attributable to this defendant is the entire loss, we ask that the presentence report reflect that this Court has made no specific finding. We simply say that the total loss overstates the seriousness relative to this defendant. And he would like to reserve the right to argue his responsibility for a specific dollar figure in the event he finds himself before an immigration tribunal on that definition of so-called aggravated felony.

Apropos that, your Honor, if I could, there's a restitution issue in the presentence report and the recommendation that I received last week. Briefly, your Honor, if I could address that. 18 U.S.C. 3664(h) and the joint and several liability cases and the leading case in this district is United States vs. Nucci, N-U-C-C-I, 364 F3d 419, simply ratifies — Judge Newman ratifies that the trial court has broad discretion to allocate restitution figures among multiple defendants according to their economic circumstances.

And I read the phrase "economic circumstances" to include both the defendant's near indigency — as your Honor can see from the presentence report, he has an obvious cash flow problem. That's only going to be exacerbated hereafter. But also the economic circumstance that the government stipulates he did not receive any money from the scheme.

[20] So under those circumstances, I would ask this Court in allocating the restitution, rather than making a joint and several full amount to all the defendants, that this defendant be exempted from any portion of the restitution order based on his role in the offense.

THE COURT: Sorry. Go ahead, Mr. Furlong.

MR. FURLONG: I was about to inquire or ask if the government had a position. I've made mine clear.

THE COURT: On the issue of restitution?

MR. FURLONG: Restitution. I don't know if the Court wants me to go to other issues or just join this one first.

THE COURT: I don't mind.

MR. ASNER: Sure, your Honor. We do have a position. The government believes that while the Court certainly has authority to apportion restitution under Rule 3664(h), we oppose it in the circumstances. The better approach is that the defendants who are

responsible for the entire conspiracy or — where you can't partition out a particular portion of the conspiracy and say they're just responsible for this, as we have done, for example, with Balakrishna, the better approach is they be held accountable for the full amount jointly and severally. The reason for this is, at the end of the day the bank suffered terrific losses here, and every little dime will help.

And in addition, there's always the fear that going [21] forward the economic circumstances of a particular defendant will change. The example thrown around is that they could win the lottery tomorrow, and it's unfair that the banks are hurt by the fact that the economic circumstances are changed favorably, whereas from the defendant's point of view, if, for example — the typical way of doing this is that if he pays X percentage of his salary going forward, the banks end up recovering at least some of their losses.

I note also with this particular defendant, given his education, he is likely to make some money going forward or at least enough to pay a fair share of the restitution. Obviously it's unlikely that he'll end up contributing a large portion of the full hundreds of millions that are lost here.

THE COURT: Now, is that math $683,632,800.23.

MR. ASNER: Your Honor, if that's the total that was settled on by probation, I checked those numbers recently, I believe that's correct, your Honor.

THE COURT: I just want to double check that.

MR. ASNER: Those were the numbers that probation and I went back to the banks on, and those are the most recent numbers.

THE COURT: And have you started to get a list of restitution recipients that would be applicable in this case?

MR. ASNER: Yes, your Honor. I've provided them both to Ms. Murray and to probation. I believe that's reflected in [22] the presentence report. At some point I wanted to say something additional about restitution that doesn't really directly concern Nijhawan. I could do that now.

The Allied Deals trustee in bankruptcy has asked me to state that the trustee's position is that restitution should go to the Allied Deals trustee. The government, and I know probation, don't feel that way because under the statute it should go to the victims. In any event, I just wanted to put that on the record and I wanted to point out the trustee in bankruptcy is here today but asked me to put that on the record.

THE COURT: I'm happy to hear from the trustee in bankruptcy directly, if he wishes to talk.

MR. SCHWARTZ: Thank you, your Honor. Jeff Schwartz, Jaspan, Schlesinger & Hoffman, 300 Garden City Plaza, Garden City, New Jersey. Counsel to John

Barraro, the Chapter 7 trustee of the Allied Deals defendants.

Your Honor, as Mr. Asner was kind enough to place upon the record, we did have a discussion with regards to the entity to whom restitution would be paid. It is the trustee's position that as a fiduciary put in place by the US trustee's office, who is responsible for amongst other things, determining the viability of claims against Allied Deals as a result of this fraud, that he is in the best position to parse out the — any amounts that are received from restitution to [23] the various creditors and victims of the fraud. That remains our position.

I understand from Mr. Asner and his discussions with probation that that is not the position that the US Attorney's Office is taking, but I wanted to make — for the record to be clear that the bankruptcy trustee feels that he remains the entity to whom restitution is most appropriately paid.

THE COURT: OK. I take it, Mr. Furlong, that's not of major concern to you, that issue between the trustee and the government?

MR. FURLONG: At the risk of weighing in, I agree with the trustee. And the reason being that we have had no indication of setups where the banks submitted any of this for insurance purposes, etc. And that Nucci opinion to which I refer cautions district judges about putting a victim in the position where he might actually recoup more than he lost and vagueness — and the

vagueness of a restitution order in that event. And that the district judge should be specific in that respect.

It seems to me, that's just my two cents, which is ironic all by itself, that the trustee is in the best position to allocate the equity because that would be subject to the oversight of the bankruptcy judge on the restitution issues.

MR. ASNER: Your, Honor, if I could, just brief that. I don't know that —

[24] THE COURT: I think we'll resolve it today. I wouldn't mind having brief submissions from each of you on that subject.

MR. FURLONG: I'm not that interested.

MR. ASNER: Your Honor, I don't — let me put on the record briefly, because I'm not sure it's worth dwelling on that much. There are instances where a bankruptcy trustee essentially serves as an administrator to parse out. That's usually done with the consent of the victims. I have met with the victims and they are opposed to the trustee doing that in this instance.

I've also spoken with the head of our financial litigation unit, Kathy Zabrosky, who handles this sort of thing every day. And the parsing out and offsetting is done with the help of the Court in conjunction with the US Attorney's Office. While obviously we don't like to

have to go out and be a collection agency, that's our job under the statute. And that's what the law says. Restitution goes to the victims.

THE COURT: And you've had other situations where there have been bankruptcy trustees and were not —

MR. ASNER: I understand this from Mr. Schwartz that there are situations where this happens. My understanding, though, and I raised this yesterday with the head of the FLU unit, financial litigation unit, it's not situations like this. It's situations where one of the defendants is the entity in [25] bankruptcy or where the victims agree because they are so numerous that as an administrative matter, it makes sense.

The point I think to keep in mind is that a bankruptcy trustee is not identical to the set of victims. The creditors that Allied Deals has — may well be different from the set of victims; the electric company, the rent, whatever, various other creditors.

I should note, however, that the trustee has been unusually helpful in preparation in this case, and obviously they have just been a God send in helping us sort through this big mess.

THE COURT: Here's what I'll do. My inclination for today is to have the restitution payable in the traditional way that I've done it, but I have an open mind.

I give you a week if you'd like to submit something, Mr. Schwartz, and the government a week thereafter. And if you wanted to comment, Mr. Furlong, you could comment when the government does after you've seen it. So that would be — one week from today would be September 1st for Mr. Schwartz, and then September 8th for the government and/or Mr. Furlong.

MR. ASNER: Thank you, your Honor.

MR. FURLONG: Thank you, your Honor.

One brief comment on that, your Honor. As I understand joint several liability, if this Court does order joint several liability of this defendant for restitution, that [26] is not in and of itself a finding that this defendant is responsible for the entire $683 million loss.

THE COURT: That is not — well —

MR. FURLONG: He may be —

THE COURT: That's the amount that was lost.

MR. FURLONG: Right. That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. That's not a finding of over 10,000 specific to this defendant.

THE COURT: I think that's right.

Do you agree with that, Mr. Asner?

MR. ASNER: Yeah, I think it's right, your Honor. Just the loss.

THE COURT: And I do — would intend actually for purposes of restitution to use that global number and to — as you'll see in a minute, to utilize the payment schedule of 15 percent of gross income going forward. And because, of course, the number is so unusually large in this case and it seems unrealistic that any individual could ever be able to reasonably make that amount of restitution, I would — in this case, as in every case, at the appropriate time in the future entertain an application based on the circumstances as they exist at that time to reconsider. That is a general proposition that would apply in this case as well.

MR. FURLONG: Would that application ultimately have [27] to be made before the defendant concluded his term of supervised release, is that —

THE COURT: Yeah, that would be I was thinking the point, because I normally indicate that the restitution obligation runs during supervised release and ends at the end of supervised release, as with a balloon payment, if the percent of gross revenue hasn't yielded enough when it's due, or it could be made at any time, that would seem to be a time, appropriate time for that application.

MR. FURLONG: Very well, your Honor.

If I — the Court had asked me. Do you want me to continue with me brief comments?

THE COURT: Yes, sure.

MR. FURLONG: Your Honor, there was a recommendation at the tail end of the presentence report for a surrender date. I don't know if the government has any opposition, but I am asking for a surrender date for my client.

And although it's not binding on the BOP, my client is asking specifically for a judicial recommendation of Allenwood FCI, Pennsylvania, for proximity to his family.

THE COURT: I'm happy to go along with that as a recommendation. What was the date you were asking for?

MR. FURLONG: I have no specific date.

THE COURT: Oh. I thought you were asking — you mean you're asking for voluntary surrender?

[28] MR. FURLONG: Correct, your Honor.

THE COURT: Sure.

MR. ASNER: No objection.

THE COURT: I'll go along with that as well.

Appendix E

MR. FURLONG: Your Honor, my final few brief remarks are with respect to the irony in certain aspects of the presentence report, specifically paragraph 26. I'm not looking for a specific amendment, but paragraph 26. I'm directing counsel to take a look at it, the companies were run by Narendra Kumar Rastogi, Anil Anand, Manoj Nijhawan, Udhay Shankar and others.

The idea that Mr. Nijhawan was running the companies — it is a trifle ironic for myself and your Honor, who sat through the case. By the same token, the justification for the sentencing recommendation from the probation officer includes the following statement — this is the justification on the — on page 42. Nijhawan manipulated banks, auditors and investors for what appears to have been monetary gain. And what is cruelly ironic about that, your Honor, is the stipulation the government entered into that Mr. Nijhawan never received a dime in cash or other compensation from the fraudulent scheme.

I made a promise to myself, your Honor, that I would not comment on Mr. Anand at all during this proceeding. I will simply say generically it would be the ultimate irony if those [29] who profited the most in this case suffered the least, and those who profited the least were sentenced to the most.

I submitted a letter to the Court yesterday giving my reasons for why I think my client is appropriate for the bottom of that guideline range. It is still a very severe sentence, I think, given the relevant circumstances, not only of this case but of the codefendants.

Appendix E

I note parenthetically, your Honor, I had asked periodically whether I wanted to accept a judicial nomination in the lowly low lands of New Jersey. And I am reminded every time that subject comes up that I'm very comfortable with being an advocate, not so comfortable making judgments about other people. So I commend Mr. Nijhawan, too, your Honor, on that basis, and ask the Court to not only follow your conscience — I don't want to sound like I'm blowing smoke at Mr. Asner or your Honor, but I say this with the utmost respect for both of you: I wasn't a real fan of that August 18th boilerplate agreement language as being what I thought adhesive on its face, but I felt that it was an article of faith for my client to accept responsibility and commend him to this Court for sentencing, knowing that I had the utmost faith in the integrity of Mr. Asner and the integrity of this Court.

And it's on that basis I place Mr. Nijhawan before your Honor for that purpose.

THE COURT: And I take it, then, though, that you're [30] aware — we've said this before — that there is explicit in those materials an agreement by yourself and Mr. Nijhawan that a sentence of 41 months' incarceration is, A, lawful; and B, appropriate; and C, what he's willing to do in this case?

MR. FURLONG: That's precisely it, your Honor. I don't need to comment further on other aspects of that agreement, but, yes, that is explicit, your Honor.

THE COURT: OK. Mr. Nijhawan, did you want to make any comments yourself?

THE DEFENDANT: Yes, your Honor.

Honorable Judge Berman, Mr. Asner, Mr. Kibel, Mr. Furlong. I thank Mr. Furlong, your Honor, I thank you for giving me this opportunity to address the Court.

Today is a very shameful day for me. It is shameful for me, for my family and for my friends. I truly regret the events that have placed me in the position I find myself today. I never intended to harm anyone. And I'm dreadfully sorry for my actions.

I'm terribly sorry that my conduct has caused so much damage to my family, friends, bankers, auditors. I take full responsibility for my actions and I'm ashamed of my conduct.

Growing up we were taught as a Hindu in the ancient Hindu mythology, there was a saying, there's plenty on this planet to fulfill everybody's needs, but there is not enough to satisfy one person's greed.

[31] As I began writing the final chapter of this debt which I owe to society, I'm prepared to accept your sentence and begin my new life. Contrition is important because it gives an individual like me the inner moral strength to deal with failures. The value of man is not what he does with his successes in life but how he handles his failures. I intend to pay that debt and move

into the future with a greater appreciation of all that good fortune I have earned over the years.

I beg you that in judging me you consider all the good that I have done, all the contributions I've made and continued suffering I continue to endure for the past two-and-a-half years.

I seek this opportunity to continue to serve my young family and the community in a positive manner so that I can repair the damage that has been done and to get on with what I considered was a good, moral and useful life.

My heart goes out to you, your Honor. My prayers go out to you. And my hopes that my life will not be completely destroyed lie entirely in your competent, experienced and merciful hands.

I thank you.

THE COURT: I thank you.

I might say parenthetically that this has been, I think, from beginning to end a tragic affair in this case. And [32] I read even before you had spoke today your submissions to me and the submissions of your family. And I don't believe I've encountered a defendant who's being sentenced who appears to me more equipped, I guess morally and in other ways, to conclude this sorry affair and to make the most of what lies ahead of you. So I do appreciate your remarks.

Would the government wish to make any comments?

MR. ASNER: No, your Honor. Thank you.

THE COURT: OK. Then I'm going to adopt the findings of fact, noting your objections.

And to the extent that there are objections to the presentence investigation report, Mr. Furlong, unless you have further objections?

MR. FURLONG: No. Those were them, your Honor.

THE COURT: OK. Unless you, Mr. Nijhawan, have any further objections.

THE DEFENDANT: No, your Honor.

THE COURT: Or the government?

MR. ASNER: No, your Honor.

THE COURT: So, what I intend to do is to sentence at the lowest end of the — first of all, is to grant the application for a downward departure.

Now, incidentally, the basis for doing so is a little different than the application. In my opinion the departure should be on the totality of the circumstances here. I know [33] you agreed to apply only for downward departure based on overstatement, the loss overstating the seriousness of the offense, but I'm exercising my

discretion to broaden the basis for the departure so that it is unique to the facts of this case. That is certainly one circumstance I've considered, the loss in relation to the seriousness of the offense. But I've also based it on the what I consider to be rather unusual family circumstances here, including the care of defendant's mother.

I've also infused a factor the contribution that Mr. Nijhawan has made to his community. I certainly have been cognizant in sentences upon other defendants in this case, including Nangia, including Meisuria, including even Balakrishna. So on the basis of all of those factors, not one in particular, that I've determined to grant a downward departure and to the level that we have discussed, which would result in a sentence of incarceration of 41 months.

It would also include, before I propose it, it would also include a period of supervised release following incarceration, which would be five years. That would be subject to what are called the so-called mandatory conditions: First of all, that the defendant not commit another federal, state or local crime; two, that the defendant not illegally possess a controlled substance; three, that the defendant not possess a firearm and dangerous weapon or destructive device; [34] and four, that the defendant refrain from any unlawful use of a controlled substance. And he would be subject to one drug test within — this is mandatory — 15 days of placement on supervised release and at least two unscheduled drug tests thereafter.

He would also be subject to what are called the standard conditions 1 through 13, plus the following: That the defendant be supervised in his district of residence; two, that the defendant report to probation within 72 hours of release from custody. Defendant cooperate with the Department of Homeland Security in the event of any proceedings to determine his status in the United States and abide by their laws, rules and regulations.

I'm not imposing a fine in light of the restitution amount. I am going to impose joint and several restitution in the total amount of $683,632,800.23 payable at least at this point in time, unless I change my position, but to the Clerk of Court; in turn to be payable to the list of banks provided by the government and list of victim banks.

It's payable on this schedule during the term of imprisonment: If defendant is engaged in a Bureau of Prisons nonUNICOR work program, he be required to pay $25 per quarter toward the criminal financial penalties; or if the defendant were to participate in a Bureau of Prisons' UNICOR program as a grade one through four, then he would have to pay 50 percent of [35] his monthly UNICOR earnings toward the criminal financial penalties consistent with BOP regulations 28 CFR Section 545.11.

And if any portion of the financial penalties remains unpaid at the time of defendant's release from prison, the remainder shall be paid during the term of

supervised release in monthly installments of 15 percent of gross income with a balloon payment due, or balloon payment would be due at 90 days prior to the expiration of supervised release.

I've considered the factors set forth in 18 U.S.C. Section 3663 and 18 U.S.C. Section 3664 in imposing restitution, including, among others, the amount of loss sustained by victims, the financial resources of the defendant, the financial means and earnings ability of the defendant and his dependents and such other factors as I've deemed appropriate.

I also intend to impose a $200 special assessment, which is due immediately. The reasons for the sentence are as I've stated before: I think it is appropriate to downwardly depart based on the totality of the circumstances to an offense level of 22, criminal history category I and a sentencing range of 41 to 51 months. And I do believe that the sentence is appropriate given the seriousness of the offense, the needs for punishment, deterrence and rehabilitation.

I have considered the nature and circumstances of the [36] offense and the history and characteristics of Mr. Nijhawan and will impose the sentence in order to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment, also to afford adequate deterrence to criminal conduct, also to protect the public from further crimes and to provide appropriate rehabilitation.

So did defense wish to say anything further before I impose the sentence?

MR. FURLONG: No, your Honor.

THE COURT: Mr. Nijhawan?

THE DEFENDANT: No, your Honor.

THE COURT: Government?

MR. ASNER: No, your Honor.

THE COURT: Then given the downward departure which I'm granting, the guideline range, as I said, is 41 to 51 months.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that Manoj Nijhawan be committed to the custody of the Bureau of Prisons to be in prison for a term of 41 months. I will recommend that his imprisonment take place at Allenwood, Pennsylvania, and will allow for voluntarily surrender.

Upon release from imprisonment defendant shall be placed on supervised release for a term of five years, subject to the mandatory and special conditions I've already outlined [37] this morning and are hereby incorporated by reference.

I'm not imposing a fine. I am imposing joint and several restitution in the amount subject to the

conditions I've already mentioned and are hereby incorporated by reference, including the payment schedule.

I'm also imposing a $200 special assessment, which will be due immediately, and I also incorporate the reasons for the sentence that I've stated before.

The defendant will be required to surrender to the facility designated by the Bureau of Prisons on or before October 26, 2004, at 2:00 p.m.

And does either counsel know of any legal reason why the sentence should not be imposed as so stated?

MR. FURLONG: No, your Honor.

MR. ASNER: No, your Honor.

THE COURT: Then I hereby order the sentence to be imposed as so stated.

Mr. Nijhawan, to the extent that you have not already waived your appeal rights, and now I refer again to the sentencing stipulation dated August 18, 2004, and signed today which says that you would not appeal or litigate under 28 United States Code, Sections 2241 or 2251 any sentence that is within or below the stipulated range of 41 to 293 months as this sentence is; but to the extent that there are remaining appeal rights, then you have the right to appeal.

[38] If you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal *informa pauperis*. And if you request, the Clerk of Court will prepare and file a notice of appeal on your behalf immediately.

Do you understand those appeal rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are there any aspects of the case the government is seeking to dismiss?

MR. ASNER: Yes, your Honor. The government seeks to dismiss the underlying indictment as it relates to Mr. Nijhawan.

THE COURT: Permission granted.

Does counsel wish to add anything today, Mr. Furlong?

MR. FURLONG: No, your Honor.

THE COURT: Government?

MR. ASNER: No, your Honor.

THE COURT: All that remains, Mr. Nijhawan, is for me to wish you the very best of luck going forward. And we are adjourned for today.

DEFENDANT: Thank you.

(Adjourned)

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 25, 2004

UNITED STATES DISTRICT COURT
SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA

V.

Manoj Nijhawan

Case Number: 02 cr 673

USM Number: 53683-054

John Furlong
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

X was found guilty on count(s) *One and Thirty* after a plea of not guilty.

Appendix F

The defendant is adjudicated guilty of these offenses:

Title & Section	*Nature of Offense*	*Offense Ended*	*Count*
18 USC § 371	Conspiracy to Commit Bank Fraud, Mail Fraud and Wire fraud	May 14, 2002	One
18 USC § 1956(h)	Conspiracy to Commit Money Laundering	May 14, 2002	Thirty

The defendant is sentenced as provided in pages 2 through *6* of this judgment. The sentence is imposed pursuant the Sentencing Reform Act of 1984.

X Count(s) *any open* are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Appendix F

August 25, 2004
Date of Imposition of Judgment

s/ Richard M. Berman
Signature of Judge

Richard M. Berman, United States District Judge
Name and Title of Judge

August 25, 2004
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: *41 months*

X The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant be placed in a facility in Allenwood, Pennsylvania.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
X before 2 p.m. on *October 26, 2004*

* * *

Appendix F

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: *5 years*

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

Appendix F

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix F

ADDITIONAL SUPERVISED RELEASE TERMS

1 - Defendant shall report to probation within 72 hours of his release from prison;

2 - Defendant shall be supervised in his district of residence;

3 - Defendant shall pay a $200 special assessment;

4 - Defendant shall pay $683,632,800.23 in restitution jointly and severally;

5 - Defendant shall cooperate with the Department of Homeland Security - Bureau of Citizenship and Immigration Services and abide by its rules, regulations and laws.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	*Fine*	*Restitution*
TOTALS	$ 200	$0	$ 683,632,800.23

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

It the defendant makes a partial payment, each payee shall receive an approximately proportioned

payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee
See attached list for victims and amounts.

*Total Loss**
$683,632.800.23

Restitution Ordered
$683,632,800.23

Priority or Percentage
pro rata

TOTALS *$683.632.800.23* *$683,632,800.23*

* * *

Appendix F

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $200.00 due immediately, balance due

X in accordance X F below; or

* * *

F X Special instructions regarding the payment of criminal monetary penalties:

During the term of imprisonment, if the defendant is engaged in a BOP *non*-UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties. However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11. If any portion of the financial penalties remain unpaid at the time of defendant s release from prison, the remainder shall be paid during the term of the supervised release in monthly installments of 15% of gross monthly revenue. Any remaining balance shall be paid in a balloon payment 90 days prior to the expiration of the supervised release term.

Appendix F

Unless the court has expressly ordered otherwise, this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and and corresponding payee, if appropriate.

Defendant is jointly and severally liable with the codefendants in this case.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX G — ORDER OF THE UNITED STATES SUPREME COURT GRANTING CERTIORARI DATED JANUARY 16, 2009

(ORDER LIST: 555 U.S.)

FRIDAY, JANUARY 16, 2009

CERTIORARI GRANTED

08-495 NIJHAWAN, MANOJ V. MUKASEY, ATT'Y GEN.

The petition for a writ of certiorari is granted limited to the following question: "Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million." The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The brief of respondent is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.

PETITIONER'S BRIEF

122

(4)

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

No. 08-495

IN THE

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

Attorneys for Petitioner

220683

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BOTH 4CVUCK

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QUESTION PRESENTED

Whether the petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i) and (U) where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million?

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OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 523 F.3d 387 (3d Cir. 2008) and appears in Appendix A to the Petition for Certiorari at App. 1a-42a.[1] The decisions of the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear at App. 44a-51a and App. 52a-61a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2008, and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 17, 2008. App. 62a-63a; JA 3a-4a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii)

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

---

1. References preceded by "App." are to the appendix to the Petition for Certiorari, references preceded by "JA" are to the joint appendix and references preceded by an "R." are to the certified administrative record below.

8 U.S.C. § 1101(a)(43)(M)(i)

> The term "aggravated felony" means—an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

8 U.S.C. § 1101(a)(43)(U)

> The term "aggravated felony" means—an attempt or conspiracy to commit an offense described in this paragraph.

PRELIMINARY STATEMENT

In this case the Petitioner Manoj Nijhawan ("Petitioner" or "Mr. Nijhawan") challenges a radical departure from the plain language of the Immigration & Nationality Act of 1952 (the "Act"), 8 U.S.C. §§ 1101 *et seq.*, accomplished in large measure by the unwarranted abandonment of the traditional categorical approach used to determine whether an offense for which an alien was convicted falls within a ground of deportation. The asserted basis for deportation here is that Mr. Nijhawan was convicted of an aggravated felony under the Act, a charge that, if sustained, effectively imposes a sentence of lifetime banishment upon this lawful permanent resident alien. This attempt to expand the aggravated felony definition well beyond the language enacted by Congress, and in contravention of settled rules governing statutory construction, should be rejected just as similar attempts to expand the aggravated felony definition were turned back by this Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

STATEMENT OF THE CASE

At issue in this case is what it means for an alien to be convicted of an offense defined in 8 U.S.C. § 1101(a)(43)(M)(i), an issue on which the circuits are deeply divided. In the Second Circuit, where Mr. Nijhawan was convicted, the Court of Appeals has held in cases such as this that the loss requirement under § 1101(a)(43)(M)(i) must be found by the jury. *Dulal-Whiteway v. DHS*, 501 F.3d 116, 128 (2d Cir. 2007). By contrast, the majority decision below from the Third Circuit, where Mr. Nijhawan's deportation proceedings occurred, requires only that loss be "tethered" to the conviction, not that the jury be instructed to find loss in convicting the alien defendant. App. 16a-17a. Resolution of this split among the circuits requires close scrutiny of the plain language chosen by Congress in § 1101(a)(43)(M)(i) and the lower court's abandonment of the traditional categorical approach, which is grounded in that plain language.

A. The Legal Background

As this Court acknowledged in *Lopez*, 549 U.S. at 50-51, being convicted of an aggravated felony imposes very serious immigration consequences. Such a conviction subjects an alien to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) and bars the alien from virtually all forms of relief from removal[2] including cancellation of

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2. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, the term "removal" is now used in place of deportation to refer to the expulsion of an alien from the United States. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34n.1 (2006).

removal, voluntary departure and even political asylum. *See, e.g.*, 8 U.S.C. § 1229b(3) (alien convicted of aggravated felony ineligible for cancellation), § 1229c(b)(1)(C) (alien deportable for conviction of aggravated felony may not depart voluntarily), and § 1158(b)(2)(A)(ii) and (B)(i) (alien convicted of particularly serious crime barred from asylum and alien convicted of aggravated felony deemed to have been convicted of particularly serious crime). Furthermore, an alien in removal proceedings based on conviction of an aggravated felony is subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(B) throughout those proceedings. *Demore v. Kim*, 538 U.S. 510 (2003). Likewise, an alien removed for conviction of an aggravated felony may never lawfully return to the United States and faces a stiff criminal penalty for returning unlawfully. *See* 8 U.S.C. § 1182(a)(9)(A)(i) and (ii) (deportation for conviction of an aggravated felony constitutes a permanent bar to reentry); 8 U.S.C. § 1326(b)(2) (maximum penalty for illegal reentry after deportation for conviction of an aggravated felony set at 20 years). Finally, an alien convicted of an aggravated felony on or after November 29, 1990 can never establish good moral character for naturalization even if the alien served honorably in the armed forces of the United States during wartime. *See, e.g.*, 8 U.S.C. § 1101(f)(8); *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005) (aggravated felony bar to good moral character applies to wartime veterans).

Deportation for conviction of an aggravated felony first entered the Act with the passage of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4191 (Nov. 18, 1988). This provision originally included only murder

and trafficking in drugs or weapons within the definition. The aggravated felony provision at issue here in 8 U.S.C. § 1101(a)(43)(M)(i) was first enacted by Section 222 of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 430 and required conviction for a loss in excess of $200,000. Section 321 of IIRIRA reduced the loss element to in excess of $10,000.

These provisions were enacted against the backdrop of what has come to be called the categorical approach. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-88 (2007) (recognizing that courts have uniformly applied the categorical approach in determining whether a conviction falls within a deportable offense under the Act). Indeed, close to a century ago, starting slightly more than a decade after the turn of the 20th century, and over a half-century before being convicted of an aggravated felony became a ground of deportation, both the administrative authorities and the federal courts have employed this approach to determine the immigration consequences for an alien convicted of a crime. *See, e.g., United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) and *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (Hand, L., J.) for early examples of this approach, and *Matter of Velasquez-Herrera*, 24 I & N Dec. 503, 513 (2008) for a summary of this history. The categorical approach usually involves comparison of the deportation ground with the criminal statute to determine whether all the requirements of the deportation provision are present in the criminal statute. When the criminal statute sweeps more broadly than the ground of deportation, a determination is made to ascertain whether the alien

was convicted under that part of the criminal statute falling within the ground of deportation. *See Duenas-Alvarez*, 549 U.S. at 188-86; *Velasquez;* Rebecca Sharpless, *Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 at 1004 (2008) (hereinafter "Test").

B. Background Facts

1. Mr. Nijhawan's Life in the United States

Mr. Nijhawan has lived in this country for over two decades, raising a family and working as an accountant. R. 275, 309-313. His sole criminal record is the non-violent, white collar conviction involved in this case. R. 275, 309. He was born in India on January 12, 1959 and immigrated to this country as a permanent resident in 1985,[3] with an otherwise positive immigration record until the present proceeding. R. 275, 309-313, 324. He studied accounting and became a licensed CPA. R. 309-313. His wife, Poonam, earned a masters degree in nutrition and home economics and has been enrolled in a special education teaching certificate program. R. 309-313. The couple has two United States citizen sons, both born in this country: Karan, age 18 and Kunal, age 15. R. 309-313. His friends and family have described Mr. Nijhawan as generous, family oriented and a dedicated father, active in his community and in the lives of his children. R. 310-312.

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3. As this Court noted in *Matthews v. Diaz*, 426 U.S. 67, 82 (1976), aliens who have been here as long as Mr. Nijhawan are among "those [permanent residents] who are most like citizens."

2. The Southern District of New York Prosecution

The criminal conviction underlying the removal proceedings here represents Mr. Nijhawan's only criminal record and arose from his employment by Allied Deals, Inc. ("Allied" or the "Company"), a metal trading conglomerate charged with having obtained loans from various banks by misrepresenting the extent of the Company's business. JA 5a-45a. With the title of Deputy General Manager, Mr. Nijhawan provided accounting assistance to Allied as the assistant to Anil Anand, who was the Company's Chief Financial Officer ("CFO"). JA 9a, 10a. Of the 15 defendants originally named in the indictment, five eventually went to trial including Mr. Nijhawan and two managers for the Company.[4] R. 287-288. CFO Anand testified as a government witness at trial.[5] R. 287-288. On May 12, 2004, the jury returned guilty verdicts against the two managers, one metal company officer and Mr. Nijhawan, while acquitting the other metal company officer. R. 287-288.

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4. The other defendants who went to trial were Josielynn Salumbides, the Traffic Manager, Naina Chitroda, the Documentation Manager, and Ashok Shah and Sanjay Rohira, officers at metal companies purportedly doing business with Allied. R. 287-288.

5. On June 28, 2003, CFO Anand had entered a guilty plea under 18 U.S.C. § 1001 (false statements), § 371 (conspiracy to commit bank fraud, mail fraud and wire fraud), § 1344 (bank fraud), § 1956(h) (conspiracy to commit money laundering), and 26 U.S.C. § 7201 (tax evasion) receiving a sentence of time served of some seven months on June 17, 2008. *See United States v. Anand*, 02 Cr. 673 (S.D.N.Y. June 17, 2008) *available at* PACER, www.https://ecf.nysd.uscourts.gov.

The jury convicted Mr. Nijhawan of Counts One and Thirty of the Indictment. Count One under 18 U.S.C. § 371 charged a conspiracy to violate 18 U.S.C. § 1344, § 1341 and § 1343. Count 30 alleged a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). R. 288.

In charging the jury, the District Court repeatedly instructed that no finding of loss or amount of money laundered was necessary to convict. JA 46a, 47a, 52a, 57a. For example, addressing bank fraud under 18 U.S.C. § 1344, the District Court explained that, "The government is not required to prove that the defendant you are considering intended permanently to deprive the banks of their property or that the banks suffered the loss or that the defendant personally profited from his or her acts." JA 47a. The government never requested an instruction on amount of loss or amount laundered, while Mr. Nijhawan's specific request for a charge on loss was refused.[6] The jury returned only a general verdict of guilty. As the evidence below confirmed and the government conceded, Mr. Nijhawan himself received literally nothing from the loan schemes in which Allied was engaged and was simply paid his salary. JA 68a.

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6. This request, subject to judicial notice under Fed. R. Evid. 201(b), is contained at 14a-15a in the appendix to this brief. *See 1 Weinstein's Federal Evidence* § 201.13 (2d ed. 2008). In the Second Circuit prior to *Booker v. United States*, 543 U.S. 220 (2005), the requirement of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for a jury finding on any fact that would increase the maximum sentence was held to apply only to the statutory maximum and not the Sentencing Guidelines. *See, e.g., United States v. Norris*, 281 F.3d 357, 360-61 (2d Cir. 2002).

Under the then applicable regime for sentencing established by the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 1B1.3, Application Notes 1-2, the District Court was required to fix the controlling guideline level above the base level[7] by determining the amount of loss for all relevant conduct, not just that for which Mr. Nijhawan was convicted, and to do so under a preponderance of the evidence standard. *United States v. Nathan*, 188 F.3d 190, 204 (3d Cir. 1999) (burden of proof for loss at sentencing is preponderance of the evidence). Faced with the guideline level fixed by USP, Mr. Nijhawan accepted the government's agreement to fix his Sentencing Guidelines level at 38 based upon a total loss in excess of $100 million for *sentencing* purposes in order to obtain the right to seek a downward departure of up to 16 levels, putting his sentencing range at 41 to 51 months. JA 60a-69a. *See Booker v. United States*, 543 U.S. 220, 290 (2005) (Stevens, J., dissenting) ("[A] prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining

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7. Since he had no prior criminal record, Mr. Nijhawan's base offense level under the applicable Sentencing Guidelines, namely those as of November 1, 2001, was six, yielding a sentencing range of up to six months imprisonment. R. 308. U.S. SENTENCING GUIDELINES MANUAL, SENTENCING TABLE (2004). In preparing the Presentence Investigation Report ("PSR"), United States Probation ("USP") added 26 levels based on USP's own loss calculations under the Sentencing Guidelines. R. 308. *See Blakely v. Washington*, 542 U.S. 296, 312 (2004), which notes that under a guidelines sentencing regime, sentences may be increased, "based not on facts proved to [the defendant's] peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong."

power than if required to prove the same fact beyond a reasonable doubt."). In addition, as part of his agreement with the prosecution, Mr. Nijhawan had to give up the right to appeal his conviction and sentence including raising constitutional challenges to the Sentencing Guidelines on appeal. JA 66a.

Both the government and the District Court specifically recognized that this agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. Thus at sentencing Mr. Nijhawan's defense counsel advised the District Court that, despite the stipulation for sentencing purposes, Mr. Nijhawan was "looking to reserve on the issue of dollar amounts for another day," in what the District Court expressly recognized would be "another forum." JA 75a, 90a. Defense counsel urged that the total loss for sentencing purposes "overstates the seriousness relative to this defendant. And he would like to reserve the right to argue his responsibility for a total dollar figure in the event he finds himself before an immigration tribunal on that definition of so-called aggravated felony." JA 90a. Likewise, in fixing loss and ordering restitution for sentencing purposes in the amount of $683 million jointly and severally, the District Court held and the government *expressly* agreed that this was not a determination that Mr. Nijhawan had caused a loss in excess of $10,000:

> [DEFENSE COUNSEL]: . . . That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. *That's not a finding of over $10,000 specific to this defendant.*

> THE COURT: I think that's right. Do you agree with that [Assistant United States Attorney ("AUSA")]?
>
> [AUSA]: Yeah, I think it's right Your Honor, just the loss.

JA 97a-98a. (Emphasis supplied).

Furthermore, the District Judge, who had presided over this matter from the beginning, recognized the case to have been a "tragic affair" and observed that " . . . I don't believe I've encountered a defendant who's being sentenced who appears to me more equipped, I guess morally and in other ways, to conclude this sorry affair and to make the most of what lies ahead of [him]." JA 103a. Given the totality of all these circumstances, the District Court granted downward departure and sentenced Mr. Nijhawan to 41 months imprisonment, at the bottom of the applicable guideline under the stipulation. JA 108a.

3. Administrative Proceedings

Removal proceedings commenced against Mr. Nijhawan while he was serving his sentence at Allenwood Low Security Correctional Institution. R. 395-397. The Department of Homeland Security ("DHS") initially charged him as removable under (1) 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense under 18 U.S.C. § 1956(h) with the amounts of funds laundered exceeding $10,000 and (2) 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of an offense that involved fraud or deceit in which the loss to the victim

or victims exceeded $10,000. DHS later amended this second charge to add the conspiracy element under 8 U.S.C. § 1101(a)(43)(U). R. 95, 396. The Immigration Judge sustained both charges in a series of decisions culminating in an order of removal entered February 22, 2006. App. 52a-61a. The Immigration Judge upheld the § 1101(a)(43)(M)(i) charge solely upon the allegations in the Indictment and did not address the jury instructions, which had required no finding of loss to convict Mr. Nijhawan. App. 52a-61a.

On appeal under 8 C.F.R. § 1003.2, the Board handed down a single member non-precedent decision on August 8, 2006 that rested removability solely upon the § 1101(a)(43)(M)(i) and (U) charge.[8] App. 44a-51a. On the issue of loss, the BIA rejected the argument that loss had to be an element of the offense but recognized that loss was not established by the guilty verdict. Instead, the Board decided to "look beyond the finding of guilty to determine the amount of loss in this case." App. 49a. Accordingly, the Board made its own independent factual finding of loss based upon what had happened at sentencing, upheld the § 1101(a)(43)(M)(i) and (U) charge on that basis and declined to reach the § 1101(a)(43)(D) charge.[9] App. 49a-51a.

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8. Under 8 C.F.R. § 1003.1(g) only decisions so designated are considered precedential. *See, e.g., Matter of Yanez*, Int. Dec. 3473n.8 (BIA 2002) (en banc) holding that reliance cannot be placed upon non-precedent BIA decisions.

9. *But see* 8 C.F.R. § 1003.1(d)(iv) (BIA may not make factual findings on appeal).

D. The Court of Appeals Opinions: Majority And Dissent

A timely petition for review was filed with the United States Court of Appeals for Third Circuit on August 31, 2006 in accordance with 8 U.S.C. § 1252.[10] After briefing and oral argument on December 11, 2007, a divided panel of the Third Circuit issued majority and dissenting opinions now officially reported at 523 F.3d 387 (3d Cir. 2008). App. 1a—43a. While expressly acknowledging contrary authority from other circuits including most recently *Dulal-Whiteway* from the Second Circuit, Judge Rendell's majority opinion for herself and District Judge Irenas, sitting by designation, declined to follow the categorical approach for determining whether Mr. Nijhawan had been convicted of an offense that involved fraud or deceit in which the loss exceeded $10,000. App. 9a. The majority reached this result by reading the "in which" language in § 1101(a)(43)(M)(i) as taking Mr. Nijhawan's case outside the categorical approach outlined by this Court in *Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). App. 9a. In this connection, the majority viewed the loss requirement as the same kind of "qualifier" as those in other aggravated felony definitions that make an offense an aggravated felony only if the offense is one "for which" a sentence of one year or more has been imposed. Concluding that loss did not have to be

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10. Following completion of Mr. Nijhawan's criminal sentence and his transfer to the custody of United States Immigration & Customs Enforcement, the Third Circuit issued a stay of removal on October 4, 2007 that was continued on October 22, 2007 pending disposition of the review petition and further order of the Court. JA 2a.

established when the jury convicted Mr. Nijhawan, the panel majority held instead that loss need only be sufficiently "tethered" to the conviction and then held that such necessary "tethering" had been shown here. App. 16a—17a. Noting the conflict among the Circuits on the loss issue, with both the Second and Ninth Circuits in the opposite corner, the majority found support in the decision by the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006). The majority also expressed policy concerns that to adopt the Petitioner's position would result in far fewer deportations, while dismissing any concern that the rule adopted would result in insurmountable practical difficulties for the Immigration Courts. App. 6a, 9a.[11]

Judge Stapleton's dissent began by noting that the Third Circuit, in line with *Shepard* and *Taylor* as well as other Courts of Appeals, had presumptively applied the categorical and modified categorical approach to aggravated felony determinations. App. 28a—29a. The dissent recognized that this approach begins with what has become known as the "formal categorical approach" involving a comparison between the statute of conviction and the removal provision and, if that does not provide an answer, moves to what all Courts of Appeals describe as a "modified categorical approach." App. 28a—29a. In line with *Shepard* and *Taylor*, the dissent concluded, the modified categorical approach limits analysis to the record of conviction "in order to determine the facts upon which [an alien's] prior conviction actually and necessarily rested." App. 28a. Such an approach, the

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11. The panel majority did not rely on *Matter of Babaisakov*, 24 I & N Dec. 306 (BIA 2007).

dissent concluded, rested squarely upon the plain statutory language, just as with the sentence enhancement provisions in both *Shepard* and *Taylor*, all of which require the person at issue to have been *convicted* of the offense: "The plain language of the [Act], like [the sentence enhancement] mandates that the alien was 'convicted' of the prior offense designated in the [Act] as an 'aggravated felony.' It is not sufficient for the BIA to independently conclude that the alien 'has committed' the prior offense." App. 29a.

The dissent concluded that the approach adopted by the Second, Ninth and the Eleventh Circuits represented the better approach in contrast to that followed by the First Circuit in *Conteh*. The dissent took issue with *Conteh* as holding that the "conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in [§ 1101(a)(43)(M)(i)]." App. 31a n.15. Likewise, the dissent pointed out the flaw in *Conteh*'s reliance upon restitution orders, which were based upon a preponderance of the evidence rather than the clear and convincing standard required for removal orders. App. 31a n.15. The dissent also recognized that the modified categorical approach rested upon fairness concerns and the practical difficulties in having the Immigration Courts retry criminal cases, noting that ". . . if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary." App. 31a. The dissent held that there was no textual support for the panel majority's "tethered" test and found that this new test was not defined here

beyond holding it satisfied, thus creating confusion for the Immigration Judges and the Courts of Appeals in future cases. App. 31a n.15.

Furthermore, the dissent recognized that this case would be the first time an alien would be deported in the Third Circuit for an offense not determined to be an aggravated felony in the adjudication of guilt. App. 37a. Addressing the conviction record in Mr. Nijhawan's criminal case, the dissent pointed out that the jury was not charged to find any loss and that despite the allegations in the indictment, the "jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss." App. 35a-36a. With respect to the restitution order, the dissent held that the order suffered from the same deficiency as in *Dulal-Whiteway* since such orders are based upon a preponderance of the evidence. App. 35a—36a. Similarly, the dissent rejected reliance upon the sentencing stipulation for much the same reasons because

> [t]he stipulation with respect to the application of the Sentencing Guidelines is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.

App. 36a. Even if retention of the convicted conduct requirement would produce fewer deportations, the dissent nevertheless held that its construction of the

Act appeared to be consistent with Congressional intent reflected in the plain language of the Act and was subject to correction by the legislature, if Congress disagreed with the court. App. 36a-37a.

Mr. Nijhawan filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which was denied on July 17, 2008 over the dissent of Judge Ambro, who would have granted rehearing. App. 62a—63a. By order dated July 31, 2008, the Third Circuit granted the Petitioner's motion to stay the mandate. JA 4a. This Court granted certiorari on January 16, 2009. JA 121a.

SUMMARY OF ARGUMENT

Under the plain language the Act, the harsh penalty of deportation for conviction of an aggravated felony, which amounts to a sentence of lifetime banishment, can only be imposed upon an alien who has actually been convicted of such an offense. From the very beginning of legislation authorizing deportation, Congress has sharply distinguished between convictions that render an alien deportable and alleged misconduct that must be proved in deportation proceedings to oust an alien from the United States. Furthermore, in imposing deportation based on conviction, the Act draws a clear line between what was encompassed in the alien's conviction as opposed to what sentence the alien received after conviction. Given the plain language requiring conviction, for nearly a century the federal courts and the administrative authorities enforcing the immigration laws have employed what has come to be known as the categorical approach in determining whether a conviction falls within a ground of deportation.

This approach limits inquiry to, at most, what was established when a jury convicted an alien.

The decision below by a sharply divided panel of the Third Circuit radically departs from the plain language of the Act, the controlling categorical approach in aggravated felony determinations under the Act, and the longstanding distinction in immigration law between conviction and conduct as a basis for removal. Instead, the decision literally permits an alien to be deported based upon conduct for which the jury did not convict him, contrary to the principles established by this Court in *Shepard* and *Taylor*.

Under either the formal categorical approach or the modified categorical approach the decision below should be reversed. Applying the modified categorical approach, the jury was not instructed to find loss and thus Mr. Nijhawan was not convicted of this necessary part of the aggravated felony defined in § 1101(a)(43)(M)(i). With respect to the formal categorical approach, loss was not a necessary legal element of the federal offenses in this case so there was no match between the statutes of conviction and the aggravated felony at issue here. *See Duenas-Alvarez*.

The decision below, however, jettisons the categorical approach based upon a misreading of the plain language of the Act requiring a person to have been convicted of both the fraud or deceit *and* loss components of the aggravated felony defined by § 1101(a)(43)(M)(i), a result fundamentally at odds with *Duenas-Alvarez* and other decisions of this Court

involving the categorical approach. *See, e.g., United States v. Rodriquez*, 128 S.Ct. 1783 (2008) and *Begay v. United States*, 128 S.Ct. 1581 (2008). In this connection, moreover, the decision below runs directly counter to the structure of the aggravated felony definitions enacted by Congress and creates an entirely new standard of "tethering" loss to conviction, a novel approach entirely divorced from the statutory language, which requires the alien to have been convicted of the loss. The dissent below correctly recognized that this case would be literally the first time that the Third Circuit had sanctioned deportation for a specified conviction where the alien had not actually been convicted on the ground of deportability. Never has this Court sanctioned deportation under such circumstances.

In relying upon what transpired at sentencing, the decision below fails to recognize that this occurs *after* the jury convicted Mr. Nijhawan and is thus excluded from the plain language of the Act, which looks to a conviction. Indeed, relevant conduct under the Sentencing Guidelines extends beyond what was charged in the criminal case. Such sentencing determinations, whether of loss for sentencing purposes or restitution, are fundamentally at odds with both the requirement that the alien have been *convicted* of the aggravated felony, which presupposes proof beyond a reasonable doubt, and the burden of proof in removal proceedings, which is by clear and convincing evidence. Sentencing determinations, however, are governed by a preponderance of the evidence standard and are made after the jury convicts.

In addition, the decision below overlooked the longstanding rule of lenity or narrow construction most recently reaffirmed by this Court in *Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (2008). This controlling rule requires that any ambiguity in a deportation provision must be resolved in the alien's favor given the harsh consequences of removal. The dissent below and the well-reasoned decisions or dissents in other Circuits make abundantly clear that the relevant statutory provisions should be construed in the Petitioner's favor. The error of the Third Circuit in not applying this rule is underscored by the fact that, while the dissent below establishes clear rules for the prompt resolution of aggravated felony issues in the Immigration Courts, the majority decision writes a prescription for chaos. Already overburdened Immigration Judges will effectively be forced to retry criminal cases in order to render the factual determinations required under the majority opinion, leaving future appellate panels, already beset with bulging immigration dockets, to define and refine the undefined "tethering" standard set by the decision below but not adopted by Congress. In short, the decision below ultimately will force the Immigration Courts into territory this Court has previously considered as forbidden. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt.").

To the extent that the decision below rests upon policy concerns about fewer deportations should the Petitioner's position be accepted, this cannot overcome the plain language of the Act and ultimately presents a matter for Congress, not the courts. Furthermore, these concerns are belied by the many state and federal criminal statutes in the Statutory Appendix requiring loss as an element of the offense. This same error also infects the BIA's decision in *Babaisakov*, which played no part in the decision below. The *Babaisakov* decision also rested upon the erroneous premise that employment of the categorical approach would render § 1101(a)(43)(M)(ii) (conviction under 26 U.S.C. § 7201 involving revenue loss in excess of $10,000) a nullity, when as a matter of law that criminal tax statute does require loss as an element.

The *Babaisakov* decision merits no deference because § 1101(a)(43)(M)(i) forms part of a federal criminal statute, 8 U.S.C. § 1326(b)(2) (illegal reentry after deportation for conviction of an aggravated felony), Furthermore, the Petitioner's position rests upon the plain language of the statute and traditional rules of statutory construction, both precluding any resort to deference to resolve the question presented here.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT REQUIRES THE ALIEN TO HAVE BEEN CONVICTED OF THE OFFENSE DEFINED IN 8 U.S.C. § 1101(a)(43)(M)(i) AND MANDATES APPLICATION OF THE CATEGORICAL APPROACH

The plain language of the Act requires the Petitioner to have been convicted of the loss amount and provides no basis for departing from the time honored categorical approach in determining whether Mr. Nijhawan was convicted of an aggravated felony.

A. The Statutory Language Requires The Alien To Have Been Convicted Of The Loss Amount.

The Act imposes removal only upon an alien *convicted* of an aggravated felony. *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (plain meaning controls in construction of the Act). Thus 8 U.S.C. § 1227(a)(2)(iii) could hardly be more explicit in mandating that only "an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied). The plain meaning of this provision of the Act is that it "... premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been formally *convicted* of in a court of law." *Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137, 145 (2d Cir. 2008). In contrast to

this plain language chosen by Congress here, the opinion below actually begins by stating that Mr. Nijhawan appeals from a determination by the Board that "he had *committed* an aggravated felony . . . ." App. 2a (emphasis supplied). While Congress certainly knew how to attach adverse immigration consequences to conduct found in removal proceedings to have been committed, the legislature did not do so here. *Compare, e.g.*, 8 U.S.C. § 1101(a)(13)(C)(v) (returning permanent resident alien who has committed specified offenses deemed applicant for admission); 8 U.S.C. § 1182(a)(2)(D) (alien who has engaged in prostitution within specified period is inadmissible). Indeed, 8 U.S.C. § 1182(a)(2)(A)(i)(I) even sanctions the exclusion of an alien who admits the essential elements of a crime involving moral turpitude, yet nowhere has Congress allowed for the removal of an alien who admits the elements of a defined aggravated felony. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Indeed, as noted above, all other adverse immigration consequences in the aggravated felony context require conviction. *See* 8 U.S.C. § 1229b(3), § 1229c(b)(1)(C), § 1158 (b)(2)(A)(ii) and (B)(i), § 1226(c)(1)(B), § 1182(a)(9)(A)(ii)(II) and 8 U.S.C. § 1326(b)(2).

The Act consistently distinguishes between removability or other adverse action against an alien based upon prior conviction in a criminal proceeding, on the one hand, and removability or other adverse action against an alien based upon alleged misconduct

established in immigration proceedings. *See, e.g.*, Test at 680n.2. for a compendium of provisions based on conduct found in removal proceedings).[12] Moreover, this distinction, an integral part of the current Act, runs throughout the entire history of American immigration legislation. For example, the very first legislation providing for the deportation of aliens, enacted by Congress as part of the Alien and Sedition Acts, allowed the President to remove an alien whom he judged "dangerous to the peace and security of the United States," but imposed a bar to naturalization only on aliens who were convicted for not departing as ordered. Act of June 25, 1798, 1 Stat. 570. Similarly the Immigration Act of 1917 provided for deportation of an alien convicted of a crime involving moral turpitude, but had a host of deportation grounds based upon alleged misconduct of contemporary concern such as being an anarchist. *See* Act of February 5, 1917, § 19(a), 39 Stat. 874. Furthermore, deportability based upon a conviction provides certain distinct advantages to the government, for, unlike proceedings based on alleged misconduct, the alien can never relitigate his guilt or innocence in removal proceedings, while the government does not

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12. These provisions of 8 U.S.C. include, for example, § 1182(a)(1)(A)(iv) (drug abuser or addict); § 1182(a)(2)(C) (reason to believe illicit trafficker in controlled substance); § 1182(a)(2)(H) (reason to believe trafficker in persons); § 1182(a)(2)(I) (reason to believe money launderer); § 1182(a)(3) (national security and terrorism); § 1182(a)(3)(E) (Nazi persecution and genocide); § 1182(a)(6)(C) (misrepresentation); § 1182 (a)(10)(C) (international child abductors); 1227(a)(1)(E) (smuggling); § 1227(a)(1)(G) (marriage fraud); § 1227(a)(2)(B)(ii) (drug abuser or addict); § 1227(a)(3) (failure to register and falsification of documents); § 1227(a)(4) (national security).

have to prove the alleged misconduct, only establish the fact of conviction. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1038 (1984); Test at 679 n.3 and cases cited.

With respect to what are defined as aggravated felonies under the Act, Congress has required the alien to have been convicted of the defined aggravated felony. Indeed, on the four occasions when Congress has broadened the list of aggravated felonies, Congress has never abandoned the conviction requirement.[13] *See* H.R. Conf. Rep. 101-955 at 6797 (1990). ("[T]he Conference Report broadens the list of serious crimes, *conviction* of which results in various disabilities and preclusion of benefits under the [Act]") (emphasis supplied). Under venerable principles of common law jurisprudence in a case such as this, the jury convicts by returning a guilty verdict and the defendant is then sentenced by the court. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 479n.2 (quoting Blackstone, "After trial and conviction are past, the defendant is submitted to 'judgment' by the court, 4 Blackstone 368—the stage approximating in modern terms the imposition of sentence."); *Black's Law Dictionary* 318 (8th ed. 2003) ("convict" as verb means "To find a person guilty of a criminal offense upon a criminal trial, a plea of guilty or a plea of nolo contendere."). In this connection, Congress certainly can be presumed to have been familiar with these time-honored common law principles,

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13. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003); IRIRA; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (1996); INCTA; Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990).

distinguishing between conviction and sentence in imposing the requirement that an alien have been convicted of an aggravated felony as a prerequisite to removal or other adverse consequences. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Congress presumed to be familiar with relevant background to statute). Furthermore, the presumption that statutes should not be construed in derogation of the common law provides further support for the role of the jury in determining whether an alien has been convicted of an aggravated felony and the separate role of the court in sentencing. *See, e.g., Scheidler v. NOW*, 537 U.S. 397, 402 (2003) ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common law meaning.").

Furthermore, the Act defines aggravated felony here in such a way as to leave no doubt that the *entire* definition must be satisfied by conviction. First, the Act requires conviction of the defined offense. Second, 8 U.S.C. § 1101(a)(43)(M)(i) expressly provides that "aggravated felony" includes "an offense *that* . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." (emphasis supplied). In short the plain language employing "that" introduces a restrictive clause defining "offense" to require both: 1) fraud or deceit and 2) the required loss. *See, e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* at 765-67 (2d ed. 1995) (restrictive clauses introduced by "that" "[give] essential information about the preceding noun" and "are essential to the grammatical and logical completeness of a sentence.");

William Strunk and E.B. White, *The Elements of Style* at 59 (4th ed. 2000) (relative pronoun "that" introduces restrictive clause); *The Chicago Manual of Style* § 5.202 (15th ed. 2003) ("CMS") ("In polished American prose, *that* is used restrictively to narrow a category or identify a particular term being talked about . . ."). Given the use of the relative pronoun "that" to introduce a restrictive clause ("*that* involves fraud or deceit in which the loss . . . exceeds $10,000"), the plain meaning of this provision is that not only fraud or deceit *but also a loss greater than $10,000* must be established by conviction.[14]

While the decision below relies on the "in which" language to reject this conclusion, this approach rips the "in which" phrase out of the larger context of a restrictive clause beginning with the word "that," contrary to the plain language of the statute, thereby rendering "that" a nullity. This violates the settled rules that every word in a statute must be given meaning and that language must be read in context. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute must be construed so no part rendered superfluous); *McCarthy v. Bronson*, 500 U.S. 136, 139 (2000) ("[S]tatutory

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14. § 1101(a)(43)(M)(i) was added on October 6, 1994 by floor amendment in the Senate to H.R. 783, the bill that would become INCTA, without comment. 140 Cong. Rec. S14557 (Oct. 6,1994). There is no Senate or House report discussing these aggravated felony provisions. This sparse legislative history is consistent with the plain language. *See* 140 Cong. Rec. H11292 (October 7, 1994) (statement by House Subcommittee Chairman Mazzoli notes that the Senate amendment would expand the aggravated felony definition only to include "specified" white collar crimes).

language must always be read in its proper context."). The "in which" language actually reinforces the conclusion that the loss must be inside or embodied in the conviction itself, for that would be the plain meaning of "in," especially as used in a restrictive clause beginning with "that." In other words, the plain language of this restrictive clause is not limited simply to fraud or deceit since "in which" is part of this same restrictive clause setting forth all the requirements for conviction of this aggravated felony. *See also* CMS § 5.202 at 230 ("which" is used restrictively when preceded by a preposition such as "in."). Expressed in simple mathematical terms, the error made by the majority opinion below is akin to multiplying "a" times (b+c) where "a" is conviction and "b" and "c" combined are fraud or deceit plus the loss requirement, and coming up with the answer ab + c, when, of course, the correct answer is ab + ac.

Since the plain language of the Act required Mr. Nijhawan to have been convicted of a loss exceeding $10,000 and the jury was not instructed to find such a loss, despite the request from Mr. Nijhawan's own criminal defense counsel for an such instruction, the removal charge under § 1101(a)(43)(M)(i) should be vacated under the plain language.

B. The Statutory Structure Supports Plain Meaning

The relevant statutory structure supports following the plain meaning of the statute. *See, e.g., Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2004). Thus when Congress actually intended to use a "qualifier" to denote some component of the aggravated felony definition *after* the alien had been convicted, the legislature employed the "for which" language in such provisions as 8 U.S.C. § 1101(a)(43)(G) (a theft offense "for which the term of imprisonment [is] at least one year"). *See also* 8 U.S.C. § 1101(a)(43)(F) (crime of violence for which the term of imprisonment [is] at least one year); § 1101(a)(43)(R) (offense relating to commercial bribery for which the term of imprisonment [is] at least one year) and § 1101(a)(43)(S) (offense relating to perjury for which the term of imprisonment [is] at least one year). Indeed, this follows the historic distinction reiterated by this Court in *Apprendi* between a jury convicting the defendant and the Court sentencing the defendant. While a jury might well be instructed to find a loss greater than $10,000 in order to convict,[15] a jury would not be called upon to impose a sentence of a year or more. In short, this longstanding distinction in common law jurisprudence between the role of the jury and the role of the court shatters any attempt to conflate the loss amount and a custodial sentence as "qualifiers," a term that appears

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15. As discussed below, the Statutory Appendix cites numerous examples of state and federal statutes where such a charge would be required.

nowhere in the Act. Even if § 1101(a)(43)(M)(i) were considered ambiguous, the salient difference with such other subparts as § 1101(a)(43)(G), grounded in legal history at the heart of the common law distinction between judge and jury, eliminates such ambiguity. *Cf. United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."); *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.) (on certain points "a page of history is worth a volume of logic.").

In any event, Congress simply did not provide in § 1101(a)(43)(M)(i) that an alien be convicted of an offense involving fraud or deceit *for which* loss in excess of $10,000 is determined at sentencing or *for which* restitution in an amount exceeding $10,000 is ordered at sentencing. Likewise Congress most assuredly did not define this aggravated felony as an offense for which a loss exceeding $10,000 was found to be "tethered" at sentencing, a term employed by the Third Circuit panel majority below *but not by Congress*. Indeed, the word "tethered" appears to be wholly absent from even the legislative history of § 1101(a)(43)(M)(i) and, in the end, represents little more than a judicial addition to a statute, contrary to the language chosen by Congress, just as does the reference to a "qualifier." Similarly, Congress did not provide for removal in cases where the loss "associated" with the offense at sentencing exceeded $10,000. The absence of the "for which" language in § 1101(a)(43)(M)(i) here would seem to

represent yet another example of the controlling principle of statutory construction that the inclusion of language in one section and the omission of that language in another was intentional.

Likewise, § 1101(a)(43)(M)(ii) supports application of the plain language and structure of the Act urged here. This provision, enacted together with § 1101(a)(43)(M)(i), defines an aggravated felony that is described in 26 U.S.C. § 7201 in which the revenue loss exceeds $10,000. As this Court made clear in *Boulware v. United States*, 128 S.Ct. 1168, 1172—73 (2008) conviction under 26 U.S.C. § 7201, requires proof beyond a reasonable doubt of a tax deficiency, with some circuits even requiring a substantial deficiency.[16] *See also Sansone v. United States*, 380 U.S. 343, 351 (1965). In short, requiring an alien defendant to have been convicted of the required loss under 8 U.S.C. § 1101(a)(43)(M)(i) is fully consistent with 8 U.S.C. § 1101(a)(43)(M)(ii) since conviction for a loss must be shown under that criminal tax statute as well.

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16. *See, e.g United States v. Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000); *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. Koskerides*, 877 F.2d 1129, 1137 (2d Cir. 1989).

C. The Plain Language And Structure of the Act Preclude Reliance Upon Sentencing Determinations

The plain language and structure of the Act highlight the error below in basing loss upon sentencing determinations or orders of restitution entered after the jury has convicted the alien, especially in cases under the Sentencing Guidelines. First, by requiring the alien to be convicted of the loss Congress required this component to be established by proof beyond a reasonable doubt. In this regard, the decision below falls into serious error by holding that the Petitioner's position will improperly raise the burden of proof in removal proceedings, for proof beyond a reasonable doubt is what Congress has required in mandating that the alien be convicted of the loss, not that loss be determined in some post-verdict proceeding. Second, as both the dissent here and in *Conteh* persuasively recognize, the allowance of sentencing determinations or restitution orders to establish loss would actually alter the burden of proof in immigration proceedings, for those orders are based on a preponderance of the evidence and not the clear and convincing standard required for removability. *See, e.g., In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990) (recognizing that "disparate burdens of proof foreclose application of the issue preclusion doctrine" and citing with approval the *Restatement (Second) of Judgments* comment that clear and convincing evidence is a sufficiently higher standard than preponderance, so as to prevent a finding made by preponderance to effect collateral estoppel in a case where proof by clear and

convincing evidence is required); *Matter of Carrubba*, 11 I & N Dec. 914 (BIA 1966) (recognizing that clear and convincing is a higher burden of proof than proof by preponderance). In short, the panel majority and not the dissent would radically alter the burden of proof for cases such as this.

In the final analysis, moreover, the ultimate flaw inherent in the decision below with respect to burden of proof is really twofold. First, an aggravated felony determination has been moved from a legal question, with clear, bright lines for resolution, and made into a factual one. *See Conteh v. Gonzales*, 461 F.3d 45, 68 (Hug, J., dissenting) (whether a prior conviction is an aggravated felony is "a pure question of law," which necessarily does not turn on the burden of proof). In other words, since loss, as a matter of law, must have been established in the adjudication of guilt, which requires proof beyond a reasonable doubt, there is no change in the burden of proof in immigration proceedings under the position urged by the Petitioner and adopted by the dissent below, but, instead, adherence to the legal requirement of loss being established by conviction. Test at 1009, which notes this difference. Second, the decision below, in making loss a factual matter found outside the record of conviction under a clear and convincing standard, effectively throttles the legal requirement that loss be established when the jury convicts the alien, which requires proof beyond a reasonable doubt.

Even further divorced from the plain language requiring that the alien be convicted of loss is that under the Sentencing Guidelines loss in fraud cases extends

beyond what was even charged to "relevant conduct," which may comprise conduct that was never charged and conduct for which the defendant was acquitted. U.S.S.G. § 1B1.3, Application Notes 1-2, *Obasohan v. U.S. Attorney General*, 479 F.3d 785, 790 (11th Cir. 2007). Indeed, at least one circuit has held that relevant conduct "may even include losses caused by criminal conduct that cannot be prosecuted because those acts fall outside the statute of limitations." *Obasohan*, 479 F.3d at 790. *See also United States v. Bras*, 483 F.3d 103, 107-08 (D.C. Cir. 2007) ("If a court may rely on *acquitted* conduct when proven by preponderance, reliance on previously *untried* conduct proven under that standard is a fortiori permissible."). Again, the burden of proof necessary to establish relevant conduct is only by a preponderance of the evidence, not beyond a reasonable doubt nor by clear and convincing evidence. *See United States v. Watts*, 519 U.S. 148, 157 (1997).

With respect to restitution under federal practice, the amounts again may be established by a preponderance of the evidence and not proof beyond a reasonable doubt. Two federal statutes apply to restitution: The Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C. § 3663(a)(1)(A), permits federal judges to order restitution "in addition to or . . . in lieu of any other penalties authorized by law," while the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, *requires* restitution for certain offenses, including property crimes "committed by fraud or deceit," *id.* § 3663A(c)(1)(B). These statutes allow a sentencing court to grant restitution even to alleged

victims not named in the indictment. *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996). While restitution under these circumstances remains part of the sentencing process after the jury convicts, two circuits, the Seventh and Tenth Circuits have taken the position that MVRA restitution is a civil remedy, even further divorcing restitution from the requirement that an alien be convicted of loss. *See United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008) ("Restitution under the MVRA is not a criminal punishment, at least not in this circuit."); *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993) (same).

Equally without merit in light of the plain language of the Act, is the reliance upon the sentencing stipulation, for the jury was not instructed to find any loss and this Court held long ago that a verdict cannot be modified by stipulation at sentencing. *See United States v. Norris*, 281 U.S. 619 (1930) (stipulation at sentencing stage "cannot be regarded as evidence upon the question of guilt or innocence..."). Moreover, the stipulation, undertaken well after the jury verdict, was entered into with the express reservation of the loss issue for immigration proceedings, as well as the fact that both the government and the District Court agreed at sentencing that Mr. Nijhawan had not caused a loss in excess of $10,000. Furthermore, even though Mr. Nijhawan did forfeit his *Booker* claim in order to secure a downward departure from the guideline level fixed not by the jury but by USP, the fact remains that the sentencing stipulation was the product of a regime held unconstitutional by this Court in *Booker*. *See also Nelson v. United States*, 2008 U.S. LEXIS 872 at 3 (Jan. 26, 2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.").

D. The Categorical Approach Requires Reversal of the Decision Below

Apart from contravening the plain language of the Act, the decision below contravenes the controlling categorical approach to determine whether an offense constitutes an aggravated felony, an approach grounded in the clear requirement that the alien be *convicted* of the deportable offense. As this Court recently reiterated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the categorical approach, summarized in *Taylor* and *Shepard*, has been the uniformly required method for determining whether a particular offense falls within a removable category. *See also Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal*, *supra*; Test at 1004 (2008) (*Duenas-Alvarez* "settled any debate" on applicability of categorical approach to aggravated felony determinations.). While *Taylor* and *Shepard* represent this Court's most comprehensive exposition of the categorical approach, that approach has a much longer pedigree in the immigration context dating back to such seminal cases as *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) and *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (Hand, L., J.), which involved the provisions of immigration law mandating exclusion or deportation of an alien convicted of a crime involving moral turpitude. Thus, *Mylius* limited consideration to the legal elements of the criminal statute involved, citing five basic justifications for this approach: 1) need for uniform application of the immigration law, 2) adjudicative efficiency, 3) prohibition on immigration officers being triers of the fact on underlying crime, 4) interest of the government in avoiding consideration of evidence that

contradicts the conviction, and 5) manifest injustice in treating those convicted of the same crime differently. *See* Test at 993-95. This venerable rule thus rests upon considerations apart from the Sixth Amendment jury trial requirement, though, as discussed below, such concerns also do support the categorical approach since conviction of an aggravated felony is part of a federal criminal statute, 8 U.S.C. § 1326(b)(2). *See also Velasquez-Herrera*, 24 I & N at 513 ("For nearly a century, the Federal circuit courts of appeal have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted* to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.") (emphasis in original); *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 335 (BIA 1996) (when deportability is based upon conviction the categorical approach is the only "workable approach."). *But see Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), *pet. for cert. pending*, No. 08-552 (filed Oct. 23, 2008) and *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2009) (curtailing use of categorical approach on moral turpitude issues).[17]

By the time the Act was passed in 1952, the categorical approach was recognized as controlling in determining whether a conviction fell within a deportable category. *See, e.g., Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev.

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17. These decisions run counter to the plain language and structure of the Act, overlook the rule of lenity and, on the aggravated felony issue, are at odds with *Duenas-Alvarez*.

643, 656 (1953) (in determining deportability, "[t]he record of conviction is final, and a reviewing court may not go behind the record . . . ."); Test at 995 (categorical approach applied to all grounds of deportability). In short, this recognized approach has provided the backdrop against which immigration legislation has been enacted and re-enacted. Significantly here, Congress added § 1101(a)(43)(M)(i) to the Act in 1994, some four years after *Taylor*, and there is nothing in that legislation to suggest that Congress intended to carve out an exception to *Taylor*. Moreover, by reenacting the conviction provisions of the Act without change, Congress has acquiesced in this well-known approach to construing the Act. *See, e.g., Lorillard*, 434 U.S. at 480 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .").

The categorical approach can take two forms in implementing the basic requirement that the alien have been *convicted* of an offense rendering him deportable. The first, sometimes called the formal categorical approach, limits analysis to the fact of conviction and the legal elements of the statutory offense to determine whether those elements are congruent with the elements of the removal ground. *See, e.g., Duenas-Alvarez*; *Taylor*, 495 U.S. at 602 (analysis under this approach will "look only to the fact of conviction and the statutory definition of the prior offense."). The second, often called the modified categorical approach, involves criminal statutes broader than the ground of removability and permits a carefully circumscribed inquiry into whether what was established in the

adjudication of guilt would bring the alien within the ground of removability. *Duenas-Alvarez*; *Taylor*, 495 U.S. at 602 (inquiry beyond the statutory elements permitted "in a narrow range of cases where a jury was actually required to find all the elements," of the generic offense at issue.). Thus *Taylor*, which involved a sentence enhancement for a defendant previously convicted of the crime of burglary, defined as illegal entry into a building, gave as an example of the applicability of this approach a state statute that permitted conviction for burglary based upon a break-in into either a building or automobile. Under this approach inquiry could be made into whether the indictment and jury instructions required the jury to find that the defendant had broken into a building in order to convict. Moreover, this Court has made clear that under the modified categorical approach in cases such as this, consideration is limited to what the jury "was actually required to find," in the underlying criminal case. *Taylor*, 495 U.S. at 602.

Similarly, in *Shepard*, 544 U.S. at 21-22, involving a guilty plea, allegedly to a crime of burglary of a building as a basis for sentence enhancement, this Court reversed the First Circuit on the issue of whether the defendant had been convicted of such a burglary offense. This Court rejected reliance upon the fact that the defendant at his federal sentencing had not "seriously questioned" a police report finding that he had broken into a building, holding instead that the modified categorical approach allows offenses to fall within a particular category, based only upon "conclusive records *made or used in adjudicating guilt*." 544 U.S. at 21-22 (emphasis supplied). Two recent decisions by this Court

highlight the critical difference in application of this categorical approach. In *Begay v. United States*, 128 S.Ct. 1581 (U.S. 2008) the issue presented was whether the defendant's prior state convictions for driving under the influence fell within the violent felonies subpart of the sentence enhancement provision in 18 U.S.C. § 924(e)(2)(B)(ii), which defines violent felony to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Even though the sentence enhancement specifically referred to "conduct," this Court nevertheless applied the categorical approach to resolve the issue. 128 S.Ct. at 1587. *See also James v. United States*, 550 U.S.192, 201-02 (2007) (categorical approach used to determine whether state burglary statute falls within "conduct" clause cited above). By contrast, in *United States v. Rodriguez*, 128 S.Ct. 1783 (2008), this Court did not apply the categorical approach where the issue presented was the *term of imprisonment*. Rodriguez faced a federal sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e) for a previous conviction of a "serious drug offense," which was defined as one that prescribes a maximum sentence of ten years. This Court held that state sentencing enhancements could be considered to meet the 10 year requirement. 128 S.Ct. 1790. In short, this Court's precedent, in line with the dissent below and the plain language of the Act, recognizes a sharp distinction between applying the modified categorical approach to determine what was established when the defendant was convicted and in not employing the modified categorical approach when the issue is the sentence imposed. Moreover, in applying this approach, this Court has never sanctioned reliance upon determinations made at sentencing as a substitute for what was established when a defendant was convicted.

1. The Modified Categorical Approach Mandates Reversal

Following *Taylor*, *Shepard* and subsequent authority, inquiry here should be limited to what the jury was instructed to find, since the federal criminal statutes at issue may be read as encompassing both conduct that produces a loss and conduct that does not, or that loss may be considered as an element of the offense under certain circumstances. *See Apprendi*, 530 U.S. at 501-02 (Thomas, J., concurring) (notes uniform authority that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment. . . . Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon the finding of some aggravating fact * * * [t]he aggravating fact is an element of the aggravated crime."); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 185-86 (5th Cir. 2008) (Dennis, J., dissenting) (modified categorical approach would be applied to determine whether a conviction under 26 U.S.C. § 7206(1) (filing false tax return) was an aggravated felony because statute assumed to encompass both offenses that produce a loss and offenses that do not).

Applying the modified categorical approach here makes clear that Mr. Nijhawan was not convicted of an offense within § 1101(a)(43)(M)(i) because the jury, despite the Petitioner's express request, was not instructed to make any finding on loss. In other words, contrary to the requirement of *Taylor* and *Shepard*, loss was not established in the adjudication of guilt. *See also Dulal-Whiteway*, 501 F.3d at 128 ("[f]or conviction following a trial, the BIA may rely only upon facts

actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions."); *Li v. Ashcroft*, 389 F.3d 892, 898-99 (9th Cir. 2004) (absence of jury instructions to establish loss dooms removal under § 1101(a)(43)(M)(i)). In other words, while the Petitioner may have stipulated to a loss *after* conviction solely to resolve contested sentencing issues under a regime held to be constitutionally defective by this Court in *Booker* and not presumptively reasonable under *Nelson*, the jury was never instructed, as *Taylor* requires, to find any loss. Accordingly, under the modified categorical approach, the decision below should be reversed.

2. The Formal Categorical Approach Requires Reversal

Alternatively, if analysis is limited to the statutory elements for conviction under the federal offenses at issue, reversal is also required. None of those statutes requires any loss for conviction as a matter of law. *Neder v. United States*, 527 U.S. 1, 24 (1999) (reliance and loss not necessary legal elements of 18 U.S.C. § 1341, § 1343 and § 1344). In other words, this case presents an instance where the statutes of conviction lack a necessary component of a ground of removability, namely the element of a loss exceeding $10,000. The cogent concurrence by Chief Judge Kozinski in *Li*, 389 F.3d at 899, explained this important difference under § 1101(a)(43)(M)(i) in a case where the alien had been convicted following a jury trial of offenses that did not require loss as a necessary legal element. That opinion noted, the offense of conviction "simply lacks an element of the generic crime—as when the generic crime requires

use of a gun while the crime of conviction doesn't require a weapon at all. In such circumstances, the crime of conviction can never be narrowed to conform to the generic crime for the simple reason that the jury is not *required*—as *Taylor* mandates—to find all the elements of the generic crime. It's true that some of the counts against petitioner alleged losses greater than $10,000, but since the crimes with which petitioner was charged did not make the amount of loss an element of the crime, the jury had no need to pass on the issue." 389 F.3d at 899. In short, focus on the elements of the generic offense, as in *Duenas-Alvarez*, resolves the issue, for the generic offense defined in § 1101(a)(43)(M)(i) requires loss but the federal criminal statutes here do not.

Accordingly, an alien cannot be removed based upon his conviction under a criminal statute that lacks a necessary element of the deportation provision. Moreover, just as *Shepard* applied the principles of *Taylor* to a guilty plea, so *Kawashima v. Mukasey*, 530 F.3d 111 (9th Cir. 2008), *petition for reh'g en banc pending* Nos. 04-7431 and 05-74407 (filed Sept. 15, 2008), applied the logic of Chief Judge Kozinski's concurrence to a guilty plea under a statute that did not require loss as a necessary legal element. Again, Chief Judge Kozinski's approach is fully consistent with the fundamental distinction between what must be established beyond a reasonable doubt to the jury and what might later be determined as part of the sentencing process, with the only difference from the modified categorical approach being focus on the necessary legal elements for conviction in the underlying offense. Furthermore, application of this simple, bright line rule does not render § 1101(a)(43)(M)(i) a dead letter by any means,

given the host of federal and state statutes in the Statutory Appendix that require loss as a necessary legal element or may trigger application of the modified categorical approach to determine if the jury was instructed to find loss. Indeed, of particular significance here, should be the fact that § 1101(a)(43)(M)(i) is not defined by reference to any particular federal criminal statute, least of all the ones at issue here, but instead sweeps broadly to encompass those state statutes requiring loss as a necessary legal element. Furthermore, as discussed below, this bright line rule obviates the *Apprendi* problem posed by a contrary approach given the role played by § 1101(a)(43)(M)(i) as a determinant of the maximum sentence for illegal reentry under 8 U.S.C. § 1326(b)(2).

E. Policy Arguments Cannot Overcome Plain Language

To the extent that the decision below rests upon concerns about fewer deportations if Petitioner's position is accepted, this represents a policy matter for Congress to address, should such legislative action be deemed necessary in the first place, rather than for an appellate court to create a "tethering test" not enacted by Congress. The short answer to this questionable concern that the plain language of § 1101(a)(43)(M)(i) may sometimes make removal difficult was given by Judge Calabresi in *Gertsenshteyn*, 544 F.3d at 148, when he noted that this "is no reason for immigration courts to renounce the restrictions that . . . the law requires." *See also Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (even if result troubling court must give effect to plain language of the statute, with

correction to come from Congress). Furthermore, adherence to the plain language of the Act would simply underscore the government's need to act in a more coordinated fashion to secure removal of targeted aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court or burdening this Court and the Courts of Appeals with refining and applying non-statutory "tethering" tests. This would hardly seem to place an insurmountable burden and appears comparable to the measures undertaken by the government during the period between *Blakely* and *Booker* to submit sentencing "facts" to the jury. *Booker*, 530 U.S. at 779-780 (Stevens, J., dissenting). *See also United States v. Beguette*, 309 F.3d 448, 450 (7th Cir. 2002) (before *Booker* amount of drugs in narcotics prosecution submitted to jury on special verdict form); *Jalbert v. United States*, 375 F.2d 125, 126 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967) (value of property in prosecution under 18 U.S.C. § 641 submitted to jury). Furthermore, the fact that over 90% of all federal convictions are obtained by guilty pleas serves to highlight the minimum burden involved.[18]

Application of the plain language enacted by Congress simply will not render § 1101(a)(43)(M)(i) a

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18. Of the 79,205 defendants convicted and sentenced in the federal courts in 2008 out of a total of 87,604 defendants, 76,510 were convicted by guilty plea, 296 were convicted in a bench trial and 2,399 were convicted after a jury trial. Disposition Statistics Table D-4. The breakdown for fraud cases shows 11,120 defendants and 10,270 convicted: 9,886 by guilty plea, 22 by bench trials and 362 by jury trial. 2008 Disposition Statistics.

nullity. The Statutory Appendix documents the many state and federal statutes where a charge of loss would be necessary for the jury to convict. Indeed, § 1101(a)(43)(M)(i) is not tied to any specific federal fraud statute, such as 18 U.S.C. § 1341, but rather sweeps broadly using the generic definition of fraud or deceit to encompass both state and federal statutes. *See, e.g.*, Colorado Statute § 18-4-409 (second degree aggravated vehicle theft where the vehicle is taken by deception is a class 5 felony, if value of the car exceeds $20,000); Conn. Gen. Stat. § 53a-122 (first degree larceny by false premises, false pretenses, trick or fraud requires value of property taken to exceed $10,000). These are the kinds of statutes to which Congress referred in enacting 8 U.S.C. § 1101(a)(43)(M)(i). In addition to the federal statutes cited in the appendix, a broad range of other federal statutes may have loss determined by jury or plea under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the maximum fine based on loss calculations is sought pursuant to 18 U.S.C. § 3571(d). *See, e.g., United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) (where maximum fine sought, loss must be submitted to jury under *Apprendi*).

Moreover, § 1101(a)(43)(M)(i) is also not the only aggravated felony provision that may be utilized to secure removal for conviction of a white collar offense, even one involving fraud. Under appropriate circumstances, § 1101(a)(43)(G) (theft offense where alien sentenced to imprisonment for a year or more) may be available where, for example, the alien is charged with theft by deception or even simply theft. Likewise, other deportation provisions are available in fraud cases, especially since this Court made clear long ago in *Jordan*

v. DeGeorge, 341 U.S. 223 (1951), that any crime with fraud as a necessary element constitutes a crime involving moral turpitude ("CIMT") *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (deportation for conviction of single CIMT where alien sentence of one year or more *may* be imposed); 8 U.S.C. § 1227(a)(2)(A)(ii)(conviction of two or more CIMT's not arising out of a single scheme without regard to sentence).

In contrast to the panel majority, the dissent sensibly establishes a clear, bright line test grounded in the plain language of the statute, one easy to administer and apply, thus serving to promote the efficient administration of the already overburdened Immigration Courts.[19] The decision below establishes an uncertain "tethering standard" with no statutory foundation, thus dropping the Immigration Courts into uncharted territory to retry criminal cases, with later appellate panels ultimately burdened to further define and refine a test that Congress itself has not adopted. Again, this would seem contrary to the role of Immigration Courts acknowledged by this Court in *Lopez-Mendoza*. Furthermore, as both *Dulal-Whiteway* and the dissent

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19. Some measure of this burden may be seen in the fact that for fiscal year 2007 Immigration Courts nationwide received 334,607 cases and 278,137 of these were removal proceedings. U.S. Department of Justice: Executive Office for Immigration Review, *FY 2007 Statistical Yearbook* at B4 (April 2008). Similarly, for each year from 2003 to 2007, immigration appeals made up the vast majority of all agency appeals to the federal circuits. Admin. Office of U.S. Courts, *Judicial Business 2007*, Table B-33, "U.S. Courts of Appeals, Source of Appeals and Original Proceedings Commenced by Circuit for the 12-Month Periods Ending September 30, 2003 Through 2007" at 98.

recognized, the Immigration Courts are ill equipped to shoulder this added burden. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (declining to apply exclusionary rule in deportation cases because of the unfamiliarity of Immigration Judges and practitioners with criminal law principles).

II. THE RULE OF LENITY OR NARROW CONSTRUCTION REQUIRES REVERSAL AND CHEVRON DEFERENCE SHOULD NOT APPLY

Even if § 1101(a)(43)(M)(i) were considered ambiguous, the rule of lenity or narrow construction should be applied to reverse the decision below. Moreover deference under *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984) has no application, especially since the aggravated felony provision is part of a federal criminal statute.

A. The Rule of Lenity Supports Reversal of the Decision Below

The decision below failed to apply the rule of lenity or narrow construction. This controlling rule has deep roots in immigration law going back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view, and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic

> measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

(emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004) (recognizing rule as basis for decision); *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); 3 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language"). Furthermore, the established character of this settled rule[20] of narrow construction has been expressly acknowledged by the Solicitor General. *See Matter of Andrade*, 14 I & N Dec. 651 (1974)(cited memorandum

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20. While this rule has sometimes been referred to as a rule of lenity, the rule is more aptly termed one of narrow construction in line with *Tan*. *See Matter of Crammond*, 23 I & N Dec. 9 (BIA 2001), *vacated on other grounds*, 23 I & N Dec. 179 (BIA 2001) (Rosenberg, J., concurring).

of Solicitor General Robert Bork to INS Commission begins analysis of a deportation issue with the rule that "Deportation statutes, because of their drastic consequences, must be strictly construed," citing *Tan*). The grounding of this rule in the harm to the alien has particular relevance here, for, as the Third Circuit recognized in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), deportation for conviction of an aggravated felony constitutes a sentence of lifetime banishment. *See also Cardoza-Fonseca*, 480 U.S. at 449 ("[d]eportation is always a harsh measure"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living."). Indeed, the severity of harm from deportation rests upon concerns that date back to the founding era with no less an authority than James Madison acknowledging that ". . . if a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, *Writings* 623, "Report on the Alien and Sedition Acts," (Library of America 1999, Jack N. Rakove, ed.). Here both Judge Stapleton's dissent, the persuasive dissents in *Conteh* and *Arguelles-Olivares* and the decisions by the Second, Ninth and Eleventh Circuits validate Mr. Nijhawan's position. Accordingly, a clearer case for application of the rule of narrow construction or lenity could hardly be imagined.

B. Chevron Has No Application Here

To the extent that *Chevron* deference may be urged by the government in light of *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) and the BIA decision in *Babaisakov*,[21] such an argument, advanced by the government in opposing certiorari, would have no merit. *See* Opp. at 11-13.

1. Babaisakov Rests On Serious Errors

The *Babaisakov* decision is fatally flawed in ignoring the plain language of the Act and the rule of lenity and also errs in concluding, 24 I & N Dec. at 314-15, that there are virtually no statutes where loss would be required as a necessary legal element for conviction. Likewise, *Babaisakov* gets matters flatly wrong in relying upon § 1101(a)(43)(M)(ii), 24 I & N Dec. at 314, because conviction under 26 U.S.C. § 7201 does require loss. Furthermore, *Matter of Gertsenshteyn*, 24 I & N Dec. 111 (BIA 2007), a principal mainstay for *Babaisakov* in abandoning the categorical approach and permitting fact-finding beyond the record of conviction to sustain an aggravated felony charge under 8 U.S.C. § 1101(a)(43)(K) (managing prostitution for commercial advantage), has not survived persuasive federal court review. *See Gertsenshteyn*, 544 F.3d at 145.

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21. Handed down before the decision below, *Babaisakov* was not cited by the panel majority, though urged by the government. The Third Circuit does not accord *Chevron* deference to aggravated felony determinations. *Singh v. Ashcroft*, 383 F.3d 144, 151(3d Cir. 2004). Likewise, while citing to *Brand X*, *Babaisakov* acknowledges that the Board will "ordinarily follow" controlling precedent in the Circuit where the case arises. 24 I & N Dec. at 324.

Applying *Babaisakov*, handed down some three years after the conclusion of Mr. Nijhawan's criminal case, would also raise serious problems with respect to the retroactivity of an administrative adjudication that, on its face, does not purport to be retroactive. The BIA even acknowledges that the decision runs contrary to "the weight of authority at the circuit court level," and "represents a departure from the precepts that have been presumed to apply in immigration hearings involving aggravated felony charges arising under § 1101(a)(43)(M)(i) of the Act." 24 I & N Dec. at 316, 322. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (agency may give retroactive force to new rule created by adjudication but "[the] retroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles." Given the acknowledged departure from existing precedent, retroactive application of *Babaisakov* here would seem to run directly counter to those equitable principles acknowledged in the cited *Chenery* decision, especially since *Babaisakov* represents "an abrupt departure from well established practice" and not "merely [an] attempt to fill a void in an unsettled area of law . . . ." *Miguel—Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007), quoting from *Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

Furthermore, *Babaisakov*, in allowing *de novo* factual findings by Immigration Judges, raises a serious challenge to the constitutional requirement of a uniform standard of naturalization embodied in U.S. Const. Art. I, § 8, Cl. 4. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 382 (1971) (holding cited clause imposes an "explicit

constitutional requirement" on naturalization eligibility). Different triers of fact would undoubtedly reach different results under the same statute, thereby undermining the fundamental fairness concerns furthered by a rule that ensures predictability, uniformity and even evidentiary reliability that are a hallmark of the categorical approach applied by this Court in *Taylor*, 495 U.S. at 601-02, but abandoned below. Indeed, as Judge Calabresi wisely observed in *Gertsenshteyn*, 544 F.3d at 146, "practical evidentiary difficulties and potential unfairness associated with looking behind [an alien's offense] of conviction [are] no less daunting in the immigration [context] than in the sentencing context." *See also* Test at 1033-34 (*Babaisakov* approach "is especially impractical when adjudicators are expected to handle a high volume of cases," and "wastes administrative resources and risks becoming 'unworkable,'"). Moreover, this burden would be imposed not only upon Immigration Judges but also, for example, on those administrative officials at United States Citizenship & Immigration Services charged with making good moral character determinations in adjudicating naturalization applications. *See* 8 C.F.R. § 316.3, § 316.4, and § 316.10; Test at 1031-35.

Accepting *Babaisakov* would also create a serious *Apprendi* problem in prosecutions under 8 U.S.C. § 1326(b)(2) involving § 1101(a)(43)(M)(i). If an aggravated felony determination could be made by factual findings on loss in Immigration Court, a sentence for illegal reentry would be enhanced not on the basis of what a jury had necessarily found in convicting the alien, but rather under a lesser standard of proof contrary to *Apprendi* and the requirements of the Sixth

Amendment. Moreover, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) would hardly seem to the contrary, especially after *Apprendi* and *Booker*.[22] *See Shepard*, 544 U.S. at 17 (Thomas, J., concurring) (arguing "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."). Accordingly, *Babaisakov* should be rejected under the rule of construing statutes to avoid constitutional doubt. *See, e.g., Jones v. United States*, 526 U.S. 227, 239-40 (1999).

2. Chevron Is Inapplicable

Since deportation for conviction of an aggravated felony is part of a federal criminal statute 8 U.S.C. § 1326(b)(2) punishing illegal reentry, its definitive construction rests with the federal courts and *Chevron* has no application. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."); *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."). The Act, however, does not grant either the Attorney General or the BIA as his delegate, the authority to construe federal criminal

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22. In *Almendarez-Torres*, the alien had been convicted of illegal reentry. A bare majority of this Court held that the sentence provided in 8 U.S.C. §1326(b)(2) for reentry after deportation for conviction of an aggravated felony could be applied even though the aggravated felony issue had not been charged to the jury.

statutes. *See* 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 1003.1. *See also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) (*Chevron* does not require judicial deference to executive interpretations of criminal law provisions); *Matter of Carachuri-Rosendo*, 24 I & N Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference; instead we owe deference to the meaning of Federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals.").

In both *Lopez* and *Leocal*, this Court did not even refer to *Chevron* in deciding aggravated felony issues, even though in *Lopez*, for example, the Board had ruled to the contrary in a precedent decision, *Matter of Yanez*. *See also Leocal*, 543 U.S. at 12n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). By contrast, the provision of the Act[23] at issue in *INS v. Aguirre—Aguirre*, 526 U.S. 415 (1999), where *Chevron* deference was accorded, was not also part of a federal criminal statute, but was freighted with foreign policy concerns about whether an alien's violent crime in a friendly foreign nation constituted a political offense, concerns not remotely present in this case. Moreover, the provision specifically gave the Attorney General the authority to "determine" the political nature of the conviction. *See* 8 U.S.C. §§ 1253(h)(1), (2)(C)(1996).

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23. The provision at issue was then 8 U.S.C. § 1253(h)(2)(c), now 8 U.S.C. § 1251(b)(3)(B)(iii), and barred an alien from withholding of removal if "there are serious reasons for considering that the alien has committed a serious nonpolitical offense outside the United States prior to the arrival of the alien in the United States."

Brand X is inapposite. The telecommunications statute in that case was not part of a federal criminal statute. Moreover, unlike *Brand X*, the Petitioner's arguments here do rest upon the plain language of the statute, to which *Chevron*, by its own terms, does not apply. Traditional rules of construction strongly support Mr. Nijhawan. *Chevron*, 467 U.S. at 842 (traditional rules of statutory construction must be consulted before turning to deference). Indeed, *Brand X* took care to note that no other rule of construction was involved such as the rule of lenity, 545 U.S. at 985, whereas here the rule of lenity or narrow construction is directly applicable.

CONCLUSION

For all the above reasons the decision below should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

Attorneys for Petitioner

APPENDIX

APPENDIX A — SURVEY OF CRIMES WITH ELEMENT OF FRAUD OR DECEIT AND LOSS TO THE VICTIM OR VICTIMS OF MORE THAN $10,000

FEDERAL - 18 U.S.C. § 668 (theft by fraud from a museum of an object of cultural heritage worth at least $100,000); 18 U.S.C. § 1031 (major fraud against United States where value of property or services in contract is $1,000,000 or more); 18 U.S.C. § 1039 (fraud in connection with obtaining confidential phone records information where violation is part of a pattern of criminal activity involving more than $100,000).

ALASKA - ALASKA STAT. § 11.46.120 (theft in the first degree if value of property is $25,000 or more, where theft can be committed by "theft by deception," defined in Alaska St. 11.46.180); § 11.46.130 (theft in second degree if value of property is $500 or more but less than $25,000, where theft can be committed by "theft by deception," defined in § 11.46.180); § 11.46.280 (issuing a bad check is class B felony if face amount of check is $25,000 or more; class C felony if face amount of check is $500 or more but less than $25,000).

ARIZONA - ARIZONA REV. STAT. § 13-1802 (E) (theft of property or services with value of $25,000 or more is a class 2 felony; theft of property or services between $4,000 and $25,000 is class 3 felony, where property or services are obtained by misrepresentation, as provided in § 13-1802 (A)(3)); § 13-2109 (credit card transaction record theft, where merchant presents with intent to defraud a credit card transaction record of sale not made by the merchant, is a class 2 felony if value is $25,000 or more; class 3 felony if value is at least $3,000 but less than $25,000)

Appendix A

COLORADO- COLO. REV. STAT. § 18-4-401(2)(c) (theft by deception is class 4 felony if value is between $1,000 and $20,000); § 18-4-401(2)(d) (theft by deception is class 3 felony if value is $20,000 or more); § 18-4-401(4) (theft by deception twice or more within six months, when aggregate value is between $1,000 and $20,000 is class 4 felony, and class 3 felony if aggregate value is $20,000 or more); § 18-4-409 (aggravated vehicle theft in the first degree, where car taken by deception, is a class 4 felony if value of car is $20,000 or less, and a class 3 felony if value of car is more than $20,000; aggravated vehicle theft in the second degree, where car taken by deception, is a class 5 felony if value of car is $20,000 or more, and a class 6 felony if value of car between $1,000 and $20,000).

CONNECTICUT - CONN. GEN. STAT. § 53a-122 (larceny, which can be committed by false promise or false pretenses (§ 53a-119), is larceny in first degree when value of property or services taken is more than $10,000); § 53a-129b (identity theft is first degree when value of property or services taken exceeds $10,000)

FLORIDA - FLA. STAT. § 812.014 (2)(c)(3) (grand theft of the third degree, and third degree felony, if value of property is $10,000 or more and less than $20,000, where taking of property can be by fraud, misrepresentation, or false promise (§ 812.012)).

Appendix A

ILLINOIS - 720 Ill. Comp. Stat. 5/16G-15 (identity theft of property valued at more than $10,000 but not exceeding $100,000 is a Class 1 felony; if value between $10,000 and $100,000 and property taken from active duty military personnel, it is a Class X felony; if value more than $100,000, it is a Class X felony); 5/16-1 (theft of property exceeding $10,000 and not exceeding $100,000 is a Class 2 felony; theft of property between $100,000 and $500,000 is a Class 1 felony; theft of property exceeding $500,000 is a non-probationable Class 1 felony).

INDIANA - Ind. Code § 35-43-4-2 (receiving stolen property is a Class C felony if value is at least $100,000 and can be committed by creating, confirming, or failing to correct a false impression held by the victim (Ind. Code § 35-43-4-1)); § 35-43-5-3.5 (identity theft is a Class C felony if the fraud or harm caused is at least $50,000); § 35-43-5-7.1 (Medicaid fraud is a Class C felony if harm caused is at least $100,000); § 35-43-5-7.2 (children's health insurance fraud is a Class C felony if harm caused is at least $100,000); § 35-43-5-12 (Check Fraud is a Class C felony if aggregate amount of property obtained is at least $25,000).

IOWA - Iowa Code § 714.2 (theft of property valued at $10,000 or more is theft in first degree and a class C felony); § 714.9 (fraudulent practice in the first degree is fraudulent practice involving money or property worth more than $10,000, and is a class C felony); §715A.6 (fraudulent use of a credit card is a class C felony if value of property or services secured is greater than $10,000).

Appendix A

KANSAS - KAN. STAT. ANN. § 21-3701 (theft, where property can be obtained by deception, of property valued more than $100,000 is a severity level 5 felony; theft of property valued at least $25,000 but less than $100,000 is a severity level 7 felony; theft of property valued between $1,000 and $25,000 is a severity level 9 felony); § 21-3704 (theft of services, where theft can be accomplished by deception or false device, where value is at least $100,000 is severity level 5 felony; theft of services where value is more than $25,000 but less than $100,000 is severity level 7 felony; theft of services where value is more than $1,000 but less than $25,000 is severity level 9 felony); § 21-3707 (giving a worthless check is severity level 7 if amount of check is $25,000 or more; giving a worthless check is severity level 9 if amount of check is between $1,000 and $25,000); § 21-3763 (counterfeiting of the retail value of $25,000 or more is a severity level 7 felony; counterfeiting of the retail value between $1,000 and $25,000 is a severity level 9 felony).

MAINE - ME. REV. STAT. ANN. tit. 17-A, § 353 (theft by unauthorized taking or transfer is a Class B crime if value of property is more than $10,000); 17-A, § 354 (theft by deception is a class B crime if value of property is more than $10,000); 17-A, § 354-A (theft by insurance deception is Class B crime if value of property is more than $10,000); 17-A, § 357 (theft of services, which can be by deception, is Class B crime if value of property is more than $10,000); 17-A, § 703 (forgery with intent to deceive is Class B crime if value of written instrument is more than $10,000).

Appendix A

MICHIGAN - MICH. COMP. LAWS § 750.218 (use of false pretenses with intent to defraud where amount of goods or services involved is $20,000 or more); § 750.219a (obtaining telecommunications services with intent to avoid charge where value of services taken is $20,000 or more); § 750.356 (larceny is a felony if value of property taken is $20,000 or more).

MINNESOTA - MINN. STAT. § 609.527 (identity theft where loss is more than $35,000); § 609.632 (counterfeiting of money where value of currency is more than $35,000); § 609.631 (offering a forged check with intent to defraud where value of check is more than $35,000).

MISSOURI - MO. REV. STAT. § 570.030 (any stealing offense where value is an element of offense is a Class B felony if value is at least $25,000); § 570.223 (identity theft resulting in harm exceeding $50,000 is a class A felony).

MONTANA - MONT. CODE ANN. 45-6-301 (theft of property by embezzlement where property is valued at more than $10,000).

NEW JERSEY - N.J. STAT. ANN. § 2C:21-17(c)(2) (identity theft where value of deprivation is between $500 and $75,000 is a crime in the third degree); §2C:21-17(c)(3) (identity theft where value of deprivation is at least $75,000 is a crime in the second degree).

Appendix A

NEW MEXICO - N.M. STAT. § 30-16-6 (fraud where value of property taken is more than $20,000 is a second degree felony); § 30-16-8 (embezzlement where value of property taken is more than $20,000 is a second degree felony); § 30-16-10 (forgery where value of damage is over $20,000 is a second degree felony); § 30-16-11 (receipt of stolen property where value of property is over $20,000 is a second degree felony); § 30-16-20 (shoplifting where value of property is over $20,000 is a second degree felony); § 30-16-33 (fraudulent use of a credit card where value of property taken is over $20,000 is a second degree felony); § 30-16-36 (receipt of property obtained through a fraudulent credit card transaction, where value of property obtained is over $20,000 is a second degree felony); § 30-44-7 (Medicaid fraud where harm is over $20,000 is a second degree felony).

NEW YORK - N.Y. PENAL LAW § 155.40[1] (grand larceny in the second degree when value of property exceeds $50,000); N.Y. Penal Law § 155.42 (grand larceny in the first degree when value of property exceeds $1,000,000); § 158.25 (welfare fraud in the first degree when value of benefits taken exceeds $1,000,000); § 158.20 (welfare fraud in the second degree when value of benefits taken exceeds $50,000); § 165.73 (trademark counterfeiting, which requires intent to defraud, in the first degree where retail value of counterfeit goods exceeds $100,000); § 176.30 (insurance fraud in first degree where value of property

1. Under New York law, the definition of larceny includes "common law larceny by trick," N.Y. Penal L. § 155.05(2)(a), and larceny "[b]y false promise," N.Y. Penal L. § 155.05(2)(d).

exceeds $1,000,000); § 176.25 (insurance fraud in second degree where value of property exceeds $50,000); § 177.25 (health care fraud in first degree where value of payment wrongfully received exceeds $1,000,000); § 177.20 (health care fraud in second degree where value of payment wrongfully received exceeds $50,000); § 177.15 (health care fraud in third degree where value of payment wrongfully received exceeds $10,000).

NORTH CAROLINA - N.C. GEN. STAT. § 14-90 (embezzlement of property from employment, where value of property is more than $100,000 is Class C felony; § 14-92 (embezzlement of property by public officer where value of property is more than $100,000 is a Class C felony; § 14-91 (embezzlement of State property by public officers where value of property is more than $100,000 is a Class C felony); § 14-93 (embezzlement of funds by financial officers of charitable and religious organizations where value of property is more than $100,000 is a Class C felony); § 14-94 (embezzlement of property by officers of railroad companies where value of property is more than $100,000 is a Class C felony); § 14-98 (embezzlement of partnership funds by surviving partner where value of property is more than $100,000 is a Class C felony); § 14-99 (embezzlement of taxes by officers where value of taxes is more than $100,000 is a Class C felony); § 14-97 (appropriation of partnership funds by partner for personal use where value of funds is greater than $100,000 is a Class C felony); § 14-100 (obtaining property by false pretenses where value of property is more than $100,000 is Class C felony).[2]

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2. Note that under all listed statutes, where the amount stolen is greater than $100,000 the crime is a Class C felony, and where less than $100,000 it is a lesser felony.

Appendix A

NORTH DAKOTA - N.D. CENT. CODE § 12.1-23-05 (theft, which includes theft by false pretenses and embezzlement (N.D. Cent. Code 12.1-23-01), is a Class B felony if value of services or property is valued at more than $10,000); N.D. Cent. Code § 12.1-24-01 (forgery or counterfeiting is a Class B felony if pursuant to scheme to defraud of money or property in excess of $10,000).

OHIO - OHIO REV. CODE. ANN. § 2913.02(B)(2) (theft, which can be accomplished by deception (§ 2913.02(A)(3)), is aggravated theft, a third degree felony, if value taken is between $100,000 and $500,000; theft is aggravated theft, a second degree felony, if value taken is between $500,000 and $1,000,000; theft is aggravated theft, a first degree felony, if value taken is more than $1,000,000); § 2913.05 (telecommunications fraud is a felony of the third degree if value of benefit obtained is more than $100,000); § 2913.11 (passing bad checks valued at $100,000 or more is a felony of the third degree); § 2913.21 (misuse of credit cards, which includes an intent to defraud, when value of property involved is $100,000 or more, is a felony of the third degree); § 2913.31(C)(1)(b)(ii) (forging identification cards, where loss to victim is $100,000 or more, is felony of third degree); § 2913.34(B)(2) (trademark counterfeiting where loss is $100,000 or more is felony of third degree); § 2913.40(E) (Medicaid fraud where value of services obtained is $100,000 or more is felony of third degree); § 2913.45(B)(defrauding creditors is third degree felony where value property involved is $100,000 or more); § 2913.47(C) (insurance fraud where value of false claim is $100,00 or more is third degree felony); § 2913.49 (I)(2)(identity fraud where value of services or property

obtained is $100,000 or more is second degree felony); § 2913.51(C) (receipt of stolen property where property is valued at $100,000 or more is third degree felony).

OKLAHOMA - OKLA. STAT. tit. 21, § 1451(B)(4) (embezzlement of $25,000 or more is felony).

OREGON - OR. REV. STAT. § 164.125(5)(d) (theft of services, which can be accomplished by deception, valued at $10,000 or more is a Class B felony).

PENNSYLVANIA - 18 PA. CODE STAT. § 4105(c)(1) (passing a bad check is misdemeanor of first degree if value between $1,000 and $75,000; passing bad check is felony of third degree if value is $75,000 or more); § 4119(c)(3) (trademark counterfeiting is felony of second degree if value of property or services is more than $10,000).

SOUTH DAKOTA - S.D. CODIFIED LAW § 22-30A-17.1 (theft, including theft by deception, of more than $100,000 is aggravated grand theft, a Class 3 felony). Theft is defined to include "[a]ny person who obtains property of another by deception . . ." S.D. Codified Law § 22-30A-3.

TENNESSEE - TENN. CODE ANN. § 39-14-105(4) (theft, including larceny by embezzlement, false pretense, and fraudulent conversion, is a Class C felony if property or services stolen are valued between $10,000 and $60,000); § 39-14-105(5) (theft is a Class B felony if property or services stolen are valued at more than $60,000); § 39-

14-121(f) (passing worthless check punished as determined by value of check, according to values laid out in § 39-14-105); § 39-14-133 (insurance fraud "is punished as in the case of theft," implicitly incorporating the gradations in § 39-14-105). *See* TENN. CODE ANN. § 39-14-101(consolidating embezzlement and false pretense into theft).

TEXAS - TEX. PENAL CODE ANN. § 31.03(e) (theft, including by trick or fraud (§ 31.02), is felony of third degree if value of property stolen is between $20,000 and $100,000; theft is felony of second degree if value of property stolen is between $100,000 and $200,000; theft is felony of first degree if value of property stolen is $200,000 or more); § 31.04(e) (theft of services is felony of third degree if value of service stolen is between $20,000 and $100,000; theft of services is felony of second degree if value of service stolen is between $100,000 and $200,000; theft of services is felony of first degree if value of service stolen is $200,000 or more); § 31.16(c) (organized retail theft is felony of third degree if value involved is between $20,000 and $100,000; organized retail theft is felony of second degree if value involved is between $100,000 and $200,000; organized retail theft is felony of first degree if value involved is $200,000 or more); § 32.23(c) (trademark counterfeiting is felony of third degree if retail value involved is between $20,000 and $100,000; trademark counterfeiting is felony of second degree if retail value involved is between $100,000 and $200,000; trademark counterfeiting is felony of first degree if retail value involved is $200,000 or more); § 32.32(c) (false statement

to obtain property or credit is felony of third degree if value of property or credit is between $20,000 and $100,000; false statement to obtain property or credit is felony of second degree if value of property or credit is between $100,000 and $200,000; false statement to obtain property or credit is felony of first degree if value of property or credit is $200,000 or more); § 32.35(e) (credit card transaction record laundering is felony of third degree if amount of record of sale is between $20,000 and $100,000; credit card transaction record laundering is felony of second degree if amount of record of sale is between $100,000 and $200,000; credit card transaction record laundering is felony of first degree if amount of record of sale is $200,000 or more); § 35.02(c) (insurance fraud is felony of third degree if amount of fraud is between $20,000 and $100,000; insurance fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; insurance fraud is felony of first degree if amount of fraud is $200,000 or more); § 35A.02(b) (Medicaid fraud is felony of third degree if amount of fraud is between $20,000 and $100,000; Medicaid fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; Medicaid fraud is felony of first degree if amount of fraud is $200,000 or more).

VERMONT - VT. STAT. ANN. tit. 13, § 2024(1) (workers' compensation fraud of more than $10,000 carries 3-year maximum penalty).

Appendix A

WISCONSIN - WIS. STAT. § 943.20(3)(c) (theft, which includes theft by deception, of property exceeding $10,000 in value is Class G felony); § 943.41(8)(c) (credit card fraud of an amount more than $10,000 is Class G felony); § 943.50(4)(c) (retail theft of more than $10,000 in property is Class G felony); § 943.91(4) (thefts from and fraud of financial institutions are Class G felonies if amount taken is between $10,000 and $100,000; theft from and fraud of financial institutions are Class E felonies if amount taken is above $100,000).

APPENDIX B — EXCERPTED TRANSCRIPT OF TRIAL IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 10, 2004 (APPRENDI CHARGE REQUEST)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 02 Cr. 673 RMB

S4 02 Cr. 673 RMB

UNITED STATES OF AMERICA,

v.

NARENDRA KUMAR RASTOGI, a/k/a Narendra Kumar, ANIL ANAND, JASPREET BASRA, a/k/a Soniya Basra, MANOJ NIJHAWAN, and UDHAY SHANKAR BALAKRISHNA, a/k/a Udhay Shankar,

NARENDRA KUMAR RASTOGI, GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, NAINA CHITRODA, MANOJ NIJAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, KAUSHIK AMIN, AMIT NANGIA, and UDHAY SHANKAR BALAKRISHNA,

Defendants.

May 10, 2004
8:45 a.m.

Appendix B

Before:

HON. RICHARD M. BERMAN,

District Judge
and a jury

[Commencing at page 2952]

(In open court; jury not present)

MR. FURLONG: Your Honor, Mr. Margolis's rebuttal reminded me of one issue I just wanted to preserve for the record, which would automatically be denied, which is the possibility of an involving [*sic*] Apprendi standard with respect to the amounts involved. Just preserving.

I know the Court would have to deny based on current law an application that the jury consider in its verdict a special interrogatory as to the amount of money my client is responsible for in both Counts 1 and now 3. [*sic*]

THE COURT: OK. I don't read into Apprendi to require that, certainly not as I understand the case law, but your objection is noted.

MR. FURLONG: I'm looking for a change, your Honor. I get that.

THE COURT: Anything else?

* * * *

RESPONDENT'S BRIEF

No. 08-495

In the Supreme Court of the United States

MANOJ NIJHAWAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record

MICHAEL F. HERTZ
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

DONALD E. KEENER
JENNIFER J. KEENEY
W. MANNING EVANS
HOLLY M. SMITH
ANDREW C. MACLACHLAN
SAUL GREENSTEIN
ERICA B. MILES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million.

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In the Supreme Court of the United States

No. 08-495

MANOJ NIJHAWAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 523 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 44a-51a) and the immigration judge (Pet. App. 54a-55a, 56a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2008. A petition for rehearing was denied on July 17, 2008 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on October 14, 2008. The petition for a writ of certiorari was granted on January 16, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. In 1988, Congress first provided that an alien who has been convicted of an "aggravated felony" is removable from the United States. At that time, Congress defined the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to include murder, certain drug- and firearms-trafficking offenses as defined in the federal criminal code, and "any attempt or conspiracy to commit" the itemized acts. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-7344, 102 Stat. 4469-4470; see 8 U.S.C. 1101(a)(43) and 1227(a)(2)(A)(iii) (1988). Since then, Congress has expanded the INA's definition of "aggravated felony" on a number of occasions.

In 1990, Congress expanded the definition of "aggravated felony" by adding "any offense described in section 1956 of title 18 (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 5048; see 8 U.S.C. 1101(a)(43) (Supp. II 1990).

In the Immigration and Nationality Technical Corrections Act of 1994 (ITCA), Pub. L. No. 103-416, 108 Stat. 4305, Congress revamped the structure of 8 U.S.C. 1101(a)(43) by listing the different aggravated felonies in separate subparagraphs. It also added several new offenses, including one at issue in this case:

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000.

8 U.S.C. 1101(a)(43)(M) (1994); see ITCA § 222(a), 108 Stat. 4322. At the time, an alien convicted of an aggravated felony after admission was rendered deportable, 8 U.S.C. 1251(a)(2)(A)(iii) (1994), but could in some circumstances seek a discretionary waiver of deportation, see *INS* v. *St. Cyr*, 533 U.S. 289, 295-297 (2001).

The definition of "aggravated felony" was further expanded in two statutes enacted in 1996: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(e), 110 Stat. 1277, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 321(a) of IIRIRA added more categories and expanded the reach of preexisting categories. Among other things, it reduced the loss thresholds in Section 1101(a)(43)(M)(i) and (ii) from $200,000 to $10,000; it reduced the term-of-imprisonment threshold for several categories from five years to one year; and it expressly made the definition of aggravated felony applicable "regardless of whether the conviction was entered before, on, or after [IIRIRA's effective date]." IIRIRA § 321(a)-(b), 110 Stat. 3009-627 to 3009-628; 8 U.S.C. 1101(a)(43)(F), (G), (J), (M), (P), (R) and (S) (Supp. II 1996).

An alien "convicted of an aggravated felony" is deportable under 8 U.S.C. 1227(a)(2)(A)(iii) and is also ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and

(b)(1)(C), asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

2. a. Petitioner is a native and citizen of India who entered the United States as an immigrant in July 1985. Pet. App. 55a. In 2002, he was arrested and indicted in the Southern District of New York for his involvement in a massive "fraudulent scheme to obtain hundreds of millions of dollars in loans from numerous major banks." J.A. 16a; see Pet. App. 2a. Count 1 of the indictment charged petitioner and 14 co-defendants under 18 U.S.C. 371 with conspiring to commit mail fraud, wire fraud, and bank fraud (in violation of 18 U.S.C. 1341, 1343, and 1344) in connection with a scheme to defraud various United States and foreign financial institutions between 1998 and 2002. J.A. 6a-29a. Count 30 charged petitioner and his co-defendants under 18 U.S.C. 1956(h) with conspiracy to commit money laundering, in connection with the laundering of proceeds derived from the scheme charged in Count 1. J.A. 30a-41a.

According to the indictment, petitioner and his co-conspirators "fraudulently induced" numerous major banks (the Victim Banks) "to issue a number of loans through an elaborate series of misrepresentations" intended to make the banks believe they were financing

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[1] An aggravated-felony conviction, however, does not disqualify an alien from withholding of removal, unless it is deemed to be for "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). An alien with an aggravated-felony conviction may obtain deferral, but not withholding, of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore, an alien convicted of an aggravated felony is barred from seeking readmission following removal, but that bar is subject to waiver. 8 U.S.C. 1182(a)(9)(A)(iii).

several companies' overseas purchases of non-ferrous metals, when the purported buyers and sellers did not exist or were shell corporations controlled by the co-conspirators. J.A. 13a-14a, 16a-20a. When the Victim Banks began investigating the defaults on their loans, petitioner and his co-conspirators "undertook a series of steps to conceal the fraud and continue the scheme," including

> (i) providing the Victim Banks with various false explanations for their customers' loan defaults, (ii) arranging for persons in the United States, India and elsewhere falsely to pose as customers during interviews with representatives of the Victim Banks, and (iii) fabricating credit reports and correspondence to create a false appearance that the purported suppliers and customers were bona fide companies, when in fact they were not.

J.A. 19a-20a.

Petitioner was the Deputy General Manager of Allied Deals Inc., one of the New Jersey metal-sales brokers (Companies) at the center of the scheme. J.A. 6a, 10a. He "provided accounting assistance to the Companies, and represented the Companies in negotiations with the Companies' banks." *Id.* at 10a. The evidence at trial demonstrated that petitioner was in charge of creating fraudulent customer files, he instructed Allied Deals's staff to generate trade references and other documents such as letters from sham customers asking for more time to pay back loans, and he provided bankers and auditors with documents containing lies and misrepresentations to induce additional loans. Admin. R. 294.

After a jury trial, petitioner was convicted of the two conspiracy counts with which he had been charged. Pet.

App. 2a-3a; J.A. 111a-112a. The federal statutes he had conspired to violate do not require proof of any particular amount of loss to the victim or victims, see 18 U.S.C. 371, 1341, 1343, 1344, 1956(h), so the jury did not find any particular amount of loss in reaching its verdict, see Pet. App. 3a.[2] In a sentencing agreement with the government, however, petitioner stipulated that "the loss from the offense exceeds $100 million," and he acknowledged that statement under oath at sentencing. J.A. 63a, 86a-87a.

The district court sentenced petitioner to a 41-month term of imprisonment. J.A. 113a. It also ordered petitioner to pay $683,632,800.23 in restitution—the amount of the "[l]oss" indicated in the judgment of conviction—jointly and severally with his co-defendants. J.A. 117a-118a; Pet. App. 3a.

b. While petitioner was serving his sentence, the Department of Homeland Security (DHS) instituted removal proceedings against him. Pet. App. 3a. DHS alleged that petitioner was removable for, *inter alia*, having been convicted of offenses that qualify as "aggravated felon[ies]." 8 U.S.C. 1227(a)(2)(A)(iii). In particular, the charge referred to a money-laundering offense

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[2] Petitioner asserts (Br. 8, 28, 41, 14a) that he sought and was refused a special verdict from the jury as to the amount of loss for which he was personally "responsible." To support that assertion, he invites (Br. 8) the Court to take judicial notice of a colloquy from his criminal case that was not included in the portions of the trial transcript introduced into evidence in the removal proceeding, and therefore not addressed in the administrative and judicial proceedings below. It would be inappropriate to do so in light of 8 U.S.C. 1252(b)(4), which requires judicial review of removal orders to proceed on the basis of the administrative record, with an exception not relevant here. In any event, as discussed below, see pp. 50-51, *infra*, the colloquy does not affect the analysis in this case.

in violation of 18 U.S.C. 1956 in which the amount of the funds exceeded $10,000 (see 8 U.S.C. 1101(a)(43)(D)), and an offense involving fraud or deceit in which the loss to the victim or victims exceeded $10,000 (see 8 U.S.C. 1101(a)(43)(M)(i)). Pet. App. 3a.[3] The charge was later amended to allege that petitioner was also removable as an "aggravated felon[]" under Subparagraph (U) of Section 1101(a)(43) for "attempt[ing] or conspir[ing] to commit" offenses described in Subparagraphs (D) and (M)(i). Admin. R. 95.

Contesting his removability, petitioner filed a motion to terminate proceedings. Pet. App. 46a. The immigration judge denied petitioner's motion, concluding that his conviction qualified as an aggravated felony under 8 U.S.C. 1101(a)(43)(D), (M)(i) and (U). Pet. App. 56a-61a. The immigration judge later ordered petitioner removed to India. *Id.* at 54a-55a.

c. The Board of Immigration Appeals (Board or BIA) affirmed the determination that petitioner had been convicted of an aggravated felony, as defined in Sections 1101(a)(43)(M)(i) and (U).[4] Pet. App. 44a-51a. The Board first concluded that petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualified as an offense involving fraud or deceit. *Id.* at 47a. The Board also concluded, based on the record evidence, that petitioner's conviction was for a fraud "in which the loss to the victim or victims exceed-

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[3] Petitioner was also initially charged with removability under 8 U.S.C. 1227(a)(2)(A)(i), concerning certain crimes of moral turpitude, but that charge was withdrawn by DHS during the course of the proceedings. Pet. App. 46a n.1; Admin. R. 62-64.

[4] The Board did not address whether petitioner was also removable for having been convicted of an aggravated felony defined in 8 U.S.C. 1101(a)(43)(D). See Pet. App. 51a.

[ed] $10,000." *Id.* at 48a-50a. The Board rejected petitioner's argument that his conviction was not an aggravated felony because the jury was not required to find, as an element of the offense, a loss exceeding $10,000. *Id.* at 48a. It reasoned that the loss threshold does not refer to an element of the offense, but rather is "used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of [Section 1101(a)(43)]." *Ibid.* The Board also noted that, "given the breadth of the federal and state fraud statutes," "[t]o read the $10,000 loss requirement as a necessary element of the crime would virtually negate the fraud ground" of removability—a result that Congress "could not reasonably have intended." *Ibid.* Looking to petitioner's sentencing stipulation that the loss exceeded $100 million, as well as the judgment of conviction directing payment of more than $683 million in restitution to the Victim Banks, the Board concluded that petitioner had been convicted of an aggravated felony, as defined by 8 U.S.C. 1101(a)(43)(M)(i) and (U). *Id.* at 50a-51a.

d. The court of appeals affirmed. Pet. App. 1a-43a. The court agreed with the Board that petitioner's fraud conspiracy conviction was for an offense that "involve[d] fraud," *id.* at 5a-7a, and that, because petitioner's indictment, sentencing stipulation, judgment of conviction, and restitution order clearly established that "the loss to the victim or victims exceed[ed] $10,000," he had been convicted of an "aggravated felony" as defined in Subparagraphs (M)(i) and (U), *id.* at 7a-26a.

The court of appeals rejected petitioner's argument that, under this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), the determination whether his fraud offense was one "in which the loss exceeded

$10,000" must be made only on the basis of facts that were necessarily found by a jury or admitted by the defendant in entering a guilty plea. Pet. App. 9a-26a. The court explained that those decisions—which concerned whether prior state burglary convictions triggered federal-criminal-sentencing provisions contained in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)—were inapplicable here, because the loss criterion in Subparagraph (M)(i), unlike the reference to burglary in ACCA, does not describe a required element of a generic offense. Instead, the court explained that Subparagraph (M)(i) "invite[s] inquiry into the facts underlying the conviction at issue," Pet. App. 12a (quoting *Singh* v. *Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004)), and it noted that its case law had "consistently treated the amount of loss as a qualifier rather than an element of the crime," *id.* at 14a. The court thus concluded that the inquiry under Subparagraph (M)(i) appropriately considers whether the record evidence establishes a loss exceeding $10,000, and whether the loss was "particularly tethered" to the specific offense of conviction charged to be an aggravated felony. *Id.* at 16a (quoting *Knutsen* v. *Gonzales*, 429 F.3d 733, 739-740 (7th Cir. 2005)); see *id.* at 26a.

The court of appeals noted that because "[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element," the rule petitioner urged "would render § 1101(a)(43)(M)(i) largely inoperative, for rarely will a defendant be convicted of a fraud offense with loss as an element found by the jury or explicitly admitted to in a guilty plea." Pet. App. 25a. Finally, the court concluded, petitioner's rule is unjustified by practical considerations concerning ease of proof, since "[i]t is well within the competence of a court to

examine the record for clear and convincing evidence of loss caused by the conduct of conviction." *Id.* at 26a.

The court of appeals recognized that, in some cases, a restitution order, for example, might not establish the appropriate amount of loss because it could be "calculated on the basis of uncharged or unconvicted conduct." Pet. App. 17a. The court had no difficulty concluding, however, that, in light of "the indictment, judgment of conviction, and [sentencing] stipulation," the offense for which petitioner was convicted had entailed a loss exceeding $10,000. *Ibid.*

Judge Stapleton dissented. Pet. App. 27a-43a. In his view, 8 U.S.C. 1227(a)(2)(A)(iii), which mandates that an alien be "convicted" of an "aggravated felony," "requires a comparison of the *prior conviction* to the generic definition of the pertinent aggravated felony—in this case, §§ 1101(a)(43)(M)(i) and (U)." Pet. App. 29a. That inquiry, he concluded, must be limited to an examination of "the facts upon which the petitioner's prior conviction actually and necessarily rested." *Id.* at 28a; see *id.* at 29a, 33a, 43a. Because, "[i]n this case, loss was not an element of the crime of conviction," and the jury was therefore not required to find any particular loss in order to convict, Judge Stapleton concluded that petitioner's fraud offense was not an "aggravated felony." *Id.* at 33a-36a, 43a.

SUMMARY OF ARGUMENT

Petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud—which was accompanied by a stipulation that losses to the victims exceeded $100 million and resulted in a restitution order for $683 million—qualifies as an "offense that * * * involves fraud or deceit in which the loss to the victim or victims

exceeds $10,000" under 8 U.S.C. 1101(a)(43)(M)(i) and (U). It therefore renders petitioner removable as a convicted aggravated felon pursuant to 8 U.S.C. 1227(a)(2)(A)(iii).

A. The text of Section 1101(a)(43)(M)(i) does not require the $10,000-loss threshold to be an element of the offense of conviction. Although it contains two restrictive clauses—one requiring the offense to "involve[] fraud or deceit" and the other requiring a loss exceeding $10,000—only the first refers to a necessary element of a qualifying offense. Some of the other definitions of "aggravated felony" in Section 1101(a)(43) require that offenses have a certain factor "as an element," but Congress did not use such language with respect to the loss threshold of Subparagraph (M)(i). Moreover, that provision must be construed *in pari materia* with Subparagraph (M)(ii), which contains an almost identical loss criterion, but would be rendered a nullity under petitioner's construction, because the only offense enumerated there—federal tax evasion under 26 U.S.C. 7201—does not have as an element any specific amount of loss to the government. Other parts of Section 1101(a)(43) likewise contain narrowing or qualifying factors that are not elements of underlying offenses, thereby reinforcing the conclusion that adjudicators may look beyond the elements of the offense in appropriate circumstances to determine whether a prior conviction was for an aggravated felony.

B. Petitioner's construction of Subparagraph (M)(i), by dramatically and unnaturally constraining the scope of the statute, would frustrate Congress's intent to remove criminal aliens. His reading would apply to only a handful of uncommon federal fraud offenses and would categorically exclude almost every one of the fraud pro-

visions that the federal government most often invokes in the criminal context (*e.g.*, mail fraud, wire fraud, bank fraud, conspiracy to defraud the government, and others). Petitioner's construction would also apply to relatively few state-law fraud offenses. He lists scattered provisions in 28 States that his reading would assertedly include, but many of them are outside the heartland of "fraud," and only 11 States have any $10,000 thresholds. Petitioner's coverage of an odd patchwork of federal and state fraud offenses makes his construction untenable. See *United States* v. *Hayes*, 129 S. Ct. 1079, 1087 (2009).

C. Permitting the loss criterion—a nonelement removability factor—to be established in removal proceedings in ways other than through the statutory elements of the offense is fully consistent with the INA, which does not mandate an elements-based categorical approach. This Court's decision in *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), did not address the applicability of the categorical approach. Moreover, in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), which involved criminal sentencing enhancements, the Court addressed constitutional concerns that are inapplicable in civil removal proceedings. The Court also evinced a concern for the practical difficulties of requiring sentencing courts to evaluate facts associated with prior convictions. The Attorney General and the Board, by contrast, have reasonably decided that it is appropriate to undertake a broader factual inquiry in administrative removal proceedings in certain circumstances.

D. If any ambiguity about the meaning of Section 1101(a)(43)(M)(i) remains, the Attorney General's construction of that statutory provision is entitled to deference. The issue does not turn on the interpretation of a

criminal statute, and it is thus within the Attorney General's and Board's interpretive authority. Petitioner's contention that any ambiguities should be resolved in the alien's favor would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance. To the extent that a conviction for an aggravated felony is a predicate for a sentence enhancement for an alien's illegal reentry under 8 U.S.C. 1326(b), any constitutional concerns under *Apprendi* would be avoided by allowing the jury in the subsequent proceeding to make a determination of the loss associated with the prior offense beyond a reasonable doubt. Cf. *Hayes*, 129 S. Ct. at 1087.

E. The loss to victims in the offense for which petitioner was convicted vastly exceeded $10,000. Based on petitioner's stipulation at sentencing that the loss from the fraud exceeded $100 million, the $683 million restitution order, and the lack of any indication that the stipulation or restitution order were based on inappropriate factors, the Board appropriately concluded that there was clear and convincing evidence that petitioner's conviction fell within the definition of an aggravated felony under Subparagraphs (M)(i) and (U).

ARGUMENT

A FRAUD CONSPIRACY IN WHICH THE VICTIMS LOST MORE THAN $100 MILLION, AS SHOWN BY A SENTENCING STIPULATION AND AN UNCONTROVERTED RESTITUTION ORDER, IS AN "AGGRAVATED FELONY" UNDER 8 U.S.C. 1101(a)(43)(M)(i) AND (U)

Under 8 U.S.C. 1227(a)(2)(A)(iii), an alien is removable if he has been "convicted of an aggravated felony," which includes "conspir[ing] to commit" an "offense that * * * involves fraud or deceit in which the loss to

the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U). Petitioner does not dispute either that he was convicted of conspiring to commit an "offense * * * involv[ing] fraud or deceit" under 8 U.S.C. 1101(a)(43)(M)(i) and (U) or that the total losses inflicted on the victim banks as a result of the conspiracy exceeded $683 million. Instead, he denies that his conviction satisfied those provisions (and thus that he is removable) because the amount of loss was not an element of the conspiracy offense of which he was convicted, and so the jury in his criminal prosecution was not required to find the amount of loss. As the court of appeals correctly ruled, however, the "loss to the victim" in Subparagraph (M)(i) refers not to an element of the underlying criminal offense but to the circumstances of the case. It therefore may be established in a removal proceeding by considering information such as a sentencing stipulation or an order of restitution.

That conclusion is supported by the text, structure, and purposes of the relevant provisions of the INA, and by practical considerations in their enforcement. If there is any ambiguity on the point, however, it is resolved by deference to the Attorney General's reasonable interpretation of the INA, under which the amount of loss need not have been an element of the underlying fraud offense and may be proved in the manner it was in this case. As this Court recently reaffirmed, "[i]t is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'" *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009) (quoting *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). If "Congress has directly spoken to the precise question at issue," "that is the end of the matter," but "if the statute is silent or ambiguous with respect to the specific issue," the Attor-

ney General's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).

A. The Text And Structure Of Section 1101(a)(43) Demonstrate That The Amount Of "Loss" In Subparagraph (M)(i) Need Not Be Determined As Part Of The Prior Adjudication Of Guilt

An alien must be "convicted" of an aggravated felony to be removable on that ground. See 8 U.S.C. 1227(a)(2)(A)(iii). But that does not mean that every aspect of the INA's definition of aggravated felony must be an element of the underlying criminal offense. To the contrary, the text and structure of Section 1101(a)(43) establish that the amount-of-loss component of Subparagraph (M)(i) need not be an element of the fraud offense of which the alien was previously convicted.

1. Subparagraph (M)(i) does not require the amount of loss to victims to be an element of the underlying fraud offense

a. Section 1101(a)(43)(M)(i) contains two restrictive clauses. While both serve a limiting purpose, they do so in different ways. The first restrictive clause, beginning with the relative pronoun "that," refers to the immediately preceding noun "offense" and specifies that an offense may be treated as an aggravated felony if it "involves fraud or deceit." The Board regarded that component of the definition as a necessary element of a qualifying offense. The second restrictive clause, beginning with "in which," in turn confines the qualifying crimes to those of such a scale as to result in a loss of more than $10,000 to one or more victims. The latter clause naturally directs inquiry to the facts of the case, rather than the statutory elements of the offense.

b. Congress knew how to require that a characteristic of an aggravated felony be an element of the offense if that had been its intention. Indeed, some parts of Section 1101(a)(43) incorporate definitions that refer specifically to an "element" of an offense. In Subparagraph (F), Congress included "a crime of violence" in the definition of aggravated felony. 8 U.S.C. 1101(a)(43)(F). That definition cross-references 18 U.S.C. 16, which expressly includes "an *offense that has as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a) (emphasis added). Similarly, Subparagraph (E)(ii) of the aggravated-felony definition incorporates "an offense described in" 18 U.S.C. 924(h), which concerns the "transfer[] [of] a firearm, knowing [it] will be used to commit a crime of violence (as defined in subsection (c)(3))." Section 924(c)(3) in turn defines "crime of violence" to include "an offense that is a felony and * * * *has as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A) (emphasis added).

If Congress had wanted to reach the result urged by petitioner, it similarly could have written Subparagraph (M)(i) to refer to "an offense that involves fraud or deceit and *has as an element* a loss to the victim or victims that exceeds $10,000." But it did not do so. This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [the Court's] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *ICE*, 543 U.S. 335, 341 (2005); see *United States* v. *Hayes*, 129 S. Ct. 1079, 1084-1085 (2009) (distinguishing between Congress's disparate use

of "element" and "elements" in offense-defining provisions). The decision to define some aggravated felonies with express reference to elements of the underlying offense but not to use a similar method in describing the loss threshold in Subparagraph (M)(i) should not be disregarded by judicial construction. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

c. Petitioner argues (Br. 22-23) that, by using the word "convicted" in provisions of the INA that make aliens who are aggravated felons removable, Congress required each characteristic of the aggravated-felony definition to be an element of the offense.[5] That argument is without merit. The requirement in 8 U.S.C. 1227(a)(2)(A)(iii) that an alien have been "convicted" of an "aggravated felony" says nothing about whether all of the qualifying criteria mentioned in the "aggravated felony" definitions in 8 U.S.C. 1101(a)(43)—including the loss criterion of Subparagraph (M)(i)—must be elements of the relevant offense. The reference to an "offense" in Subparagraph (M)(i), as modified by the phrase "involves fraud or deceit," is sufficient to satisfy the requirement of a conviction appearing in Section 1227(a)(2)(A)(iii). The $10,000-loss criterion need not

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[5] Although petitioner asserts (Br. 23) that "all * * * adverse immigration consequences in the aggravated felony context require conviction," a few references to "aggravated felony" in the INA do not so require. For example, Congress required procedures to be established for dealing with individuals "arrested * * * for" or "charged with" aggravated felonies. 8 U.S.C. 1226(d)(1)(A) and (B). The Attorney General is required to "give priority to the Federal incarceration of undocumented criminal aliens who have *committed* aggravated felonies." 8 U.S.C. 1231(i)(4) (emphasis added). And the Attorney General is required to "take into custody any alien who * * * is deportable by reason of having *committed* any offense covered in [8 U.S.C. 1227(a)(2)(A)(iii)]." 8 U.S.C. 1226(c)(1)(B) (emphasis added).

also be an element of the aggravated felony defined in Subparagraph (M)(i) in order to give meaning and purpose to the term "convicted" appearing in either Section 1227(a)(2)(A)(iii) or in other parts of the INA referring to convictions for aggravated felonies.

Indeed, the Court recently reached a similar conclusion in *Hayes*, *supra*, with regard to the federal statute, 18 U.S.C. 922(g)(9), barring firearm possession by a person previously "convicted" of a "misdemeanor crime of domestic violence." The Court held that, while the underlying misdemeanor must have a use-of-force element, the other criterion mentioned in the definition (*i.e.*, that the offense be "committed by" a person who has a specified domestic relationship with the victim) need not be an element of the underlying offense. 129 S. Ct. at 1084-1089.

d. Petitioner contends (Br. 26-27) that, within Subparagraph (M), all of the text in Clause (i) (*i.e.*, "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000") is a single, indivisible restrictive clause, because it appears after the word "that." In his view, the Board and the court of appeals "render[ed] 'that' a nullity" by concluding that only the phrase "involves fraud or deceit" must be reflected in an element of the offense of conviction. But the word "that" was given full meaning by the Board and court of appeals, by limiting a covered "offense" to one that "involves fraud or deceit."

In fact, it is petitioner who has inappropriately made words in the statute superfluous. See *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (observing that the Court is "obliged to give effect, if possible, to every word Congress used") (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). While the word "that" is of

course used to introduce restrictive clauses, so too—as petitioner concedes—is the prepositional phrase "in which." See Pet. Br. 28 (citing *The Chicago Manual of Style* § 5.202, at 230 (15th ed. 2003)). Petitioner ignores the latter restrictive clause in Subparagraph (M)(i), which qualifies the particular "fraud or deceit" offenses that are of sufficient magnitude to be considered aggravated. If Congress had intended to make the fraud and loss components of Clause (i) equal halves of a single restriction, it is unlikely to have used the words "in which" to introduce the loss component in a *separate* clause. It instead could easily have used language that combined the two into a single clause referring to an offense "that involves fraud or deceit *and* a loss" exceeding $10,000. Cf. Pet. Br. 18.

2. Subparagraph (M)(ii), which must be construed* in pari materia *with Subparagraph (M)(i), is not amenable to petitioner's categorical approaches

It is a "cardinal rule that statutory language must be read in context." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004) (internal quotation marks and brackets omitted). Here, strong cues about the meaning of Subparagraph (M)(i) are provided by Subparagraph (M)(ii), which is immediately adjacent, closely related, identically structured, and similarly phrased. Subparagraph (M)(ii) applies to an offense that "is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(ii). Section 7201 does not contain as an element that the loss to the Government exceeded $10,000. Thus, the loss threshold in Subparagraph (M)(ii) cannot be read to refer to an

element of the offense of conviction, because that reading would render Subparagraph (M)(ii) a nullity.

It follows that the parallel loss threshold in Subparagraph (M)(i) should not be read to refer to an element of the offense. Subparagraph (M)(ii) shares the same lead-in language ("an offense that—") with Subparagraph (M)(i). In both provisions, that lead-in is followed by a verb phrase that generally defines the offense ("involves fraud or deceit," or "is described in section 7201 of title 26 (relating to tax evasion)"), and that verb phrase is in turn followed by a loss provision introduced by "in which." Indeed, Subparagraphs (M)(i) and (ii) are the only two parts of Section 1101(a)(43) that include the words "in which." That fact alone counsels in favor of adopting a single construction that can reasonably be borne by both of them. But the argument for construing them *in pari materia* is made even stronger by their common history. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972). Subparagraphs (M)(i) and (ii) were both originally enacted by a single section of ITCA in 1994, and they were both amended in the same way by a single section of IIRIRA in 1996, which reduced the loss amounts from $200,000 to $10,000. See p. 3, *supra*.

Petitioner nevertheless contends that Subparagraph (M)(ii) "supports" the interpretation he urges, because a conviction under the only tax-evasion offense mentioned in that provision "requires proof beyond a reasonable doubt of a tax deficiency." Pet. Br. 31 (citing *Boulware* v. *United States*, 128 S. Ct. 1168, 1173 (2008), and *Sansone* v. *United States*, 380 U.S. 343, 351 (1965)). But the burden of proving a tax deficiency does not require the government to meet any specific monetary threshold. And petitioner does not explain how a requirement that tax evasion include a showing of "a" tax

deficiency—or even "a substantial" deficiency, which some courts of appeals have mentioned—is consistent with his proposed construction of the "in which" clause.[6] Neither of those alternatives would create a threshold of $10,000 that would need to be found by a jury or admitted in a guilty plea. See, *e.g.*, *United States* v. *McKee*, 506 F.3d 225, 235-236 (3d Cir. 2007) (referring to the need to show a "substantial deficiency," but explaining that "the government need not allege or prove the precise amount of additional tax due and owing"). As a result, no prosecution under Section 7201 would satisfy petitioner's proposed "categorical approach," which would be met only when the underlying crime had "the element of a loss exceeding $10,000." Pet. Br. 42-43. Nor would a prosecution under Section 7201 satisfy petitioner's proposed "modified categorical approach," which could be met only if the "jury 'was actually required to find'" a loss in some amount exceeding $10,000. *Id.* at 39 (quoting *Taylor*, 495 U.S. at 602). The absence of a specific minimum threshold for a tax deficiency under Section 7201 means there is no reason in a case brought under that provision for a jury to find (or a guilty plea to include) *any* precise amount of loss to establish a violation.

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[6] *Boulware* noted an apparent division in the courts of appeals about "whether the Government must prove the tax deficiency is 'substantial.'" 128 S. Ct. at 1173 n.2 (citing *United States* v. *Daniels*, 387 F.3d 636, 640-641 & n.2 (7th Cir. 2004), cert. denied, 544 U.S. 911 (2005)). As the Seventh Circuit noted in the cited opinion, some decisions have "mention[ed] a substantial tax deficiency as an element of tax evasion," but "no court has held that an insubstantial tax deficiency is not punishable under 26 U.S.C. § 7201." 387 F.3d at 640 n.2. At least one prior decision referring to a "substantial" deficiency had concluded that "a deficiency of just over $3,000 was sufficient." *Id.* at 640 (discussing *United States* v. *Davenport*, 824 F.2d 1511, 1516-1517 (7th Cir. 1987)).

Thus, petitioner's proposed construction of the loss requirement introduced by "in which" in Subparagraph (M)(i), if applied to the parallel loss requirement in Subparagraph (M)(ii), would result in no qualifying federal offenses at all—even though the aggravated felonies included in Subparagraph (M)(ii) are defined exclusively by reference to a specific federal statute. That result, which would be nothing short of absurd, should be avoided. See *United States* v. *Wilson*, 503 U.S. 329, 334 (1992).[7]

3. Other provisions in Section 1101(a)(43) also contain narrowing or qualifying factors

Although Subparagraph (M)(ii) is most parallel to Subparagraph (M)(i), other features of Section 1101(a)(43) reinforce the textual bases for concluding that the amount of loss is a qualifying factor that limits the definition of the offense without having to be an element itself.

Petitioner concedes (Br. 29) that Congress included some qualifying factors in the INA's aggravated-felony definitions that need not be treated as elements of the underlying offenses. Subparagraph (G), for example, refers to "a theft offense * * * or burglary offense *for*

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[7] While Subparagraph (M)(ii) also applies to state and foreign offenses that are comparable (save for jurisdictional aspects) to 26 U.S.C. 7201, see 8 U.S.C. 1101(a)(43) (penultimate sentence), it would be bizarre to define those offenses by reference to a federal statute that is itself excluded from the definition, and to do so with a provision that says the term "applies to an offense described in this paragraph whether in violation of Federal or State law." *Ibid.* See *Lopez* v. *Gonzales*, 549 U.S. 47, 58 (2006) (declining to adopt a construction of "drug trafficking crime" that would exclude a federal crime but include a similar state crime if the State had "chose[n] to punish [the] given act more heavily").

which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (emphasis added), and other provisions are similarly structured. See 8 U.S.C. 1101(a)(43)(F), (R) and (S). As petitioner notes (Br. 29), a jury "would not be called upon to impose a sentence of a year or more," which means those qualifying factors do not have to be elements. Petitioner nevertheless attempts (Br. 30-31) to distinguish those limitations from the loss component in Subparagraph (M)(i) on the ground that they begin with the phrase "for which"—a phrase he contends is altogether different from the "in which" employed in Subparagraph (M)(i). That difference simply cannot bear the weight petitioner places on it. The underlying structure—of introducing the loss threshold or prior-sentence threshold with a restrictive clause beginning with a preposition—is identical, and it is more natural to say that someone was sentenced "for" an offense than "in" an offense. See *Deal* v. *United States*, 508 U.S. 129, 134-135 (1993) (when Congress "uses slightly different language to convey the same message * * * it uses slightly different language that means the same thing") (internal quotation marks and emphasis omitted).

Although not discussed by petitioner, Section 1101(a)(43) also includes other provisions—introduced by phrases other than "for which" or "in which"—that contain limiting factors not easily seen as elements of underlying offenses. For instance, Subparagraphs (N) and (P) refer to certain alien-smuggling and document-fraud offenses "except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)." 8 U.S.C. 1101(a)(43)(N) and

(P). The facts in the "except" clause are case-specific and beyond the scope of the elements of the enumerated offenses. Subparagraph (O) refers to enumerated offenses of improper entry by an alien or reentry by a removed alien, but further limits the category by requiring the offense to be "*committed by an alien who* was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph," 8 U.S.C. 1101(a)(43)(O) (emphasis added). That language too requires offender-specific facts that would not be elements of the underlying offenses. Finally, Subparagraph (K)(ii) refers to "an offense that * * * is described in [18 U.S.C. 2421, 2422, or 2423] (relating to transportation for the purpose of prostitution) *if committed for commercial advantage*." 8 U.S.C. 1101(a)(43)(K)(ii) (emphasis added). But only one of those three enumerated federal statutes (18 U.S.C. 2423(d)) contains an element relating to commercial advantage.

The appearance of such qualifying and limiting factors supports the conclusion that adjudicators may look beyond the elements of the offense in appropriate circumstances to determine whether a prior conviction is a removable offense. The loss thresholds in Subparagraph (M) present another such circumstance.

B. Requiring The Amount Of Loss To Be An Element Of A Fraud Offense Under Subparagraph (M)(i) Would Unnaturally Constrain The Statute's Scope

1. When Congress amended the definition of aggravated felony in 1994 and 1996, it intended to address what it concluded were serious problems associated with criminal aliens' presence in the United States. It expanded the range of convicted conduct that would ren-

der aliens removable, and, in the case of aggravated felonies (like those in Subparagraph (M)(i)), the range of convicted conduct that would preclude discretionary relief from removal. See S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995) ("America's immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem."); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i) (aggravated-felony conviction renders alien ineligible for asylum), 1229b(a)(3) and (b)(1)(C) (aggravated felony conviction renders alien ineligible for cancellation of removal).

The legislative history of the 1996 amendments to the INA identifies three particular concerns about the government's failure to remove more criminal aliens. First, criminal aliens' ongoing presence in the United States undermined the Nation's immigration policies and control of its borders. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 111 (1996); S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996). Second, criminal aliens who had not been timely removed were "a serious threat to our public safety." 140 Cong. Rec. 4985 (1994) (statement of Sen. Roth); see H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-7 (1995) (explaining that, as a result of past congressional and Executive Branch policies, "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them"). Third, the government's failure to remove criminal aliens was, as a result of their recidivism, imposing a "significant cost * * * on our society." H.R. Rep. No. 22, *supra*, at 6-7; see S. Rep. No. 48, *supra*, at 1, 9 (estimating that confining criminal aliens

cost state and federal taxpayers at least $724 million annually).

Those concerns show that Congress's repeated expansion of the definition of aggravated felony between 1988 and 1996 was based on its determination that "[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General." S. Rep. No. 249, *supra*, at 7.

2. In light of Congress's manifest intention of significantly broadening the category of crimes that would be treated as "aggravated felonies" under the INA, the Board and the court of appeals both appropriately took into account that requiring the amount of loss to be an element of a fraud offense for purposes of Subparagraph (M)(i) would have decimated its reach. Pet. App. 25a, 48a.

Petitioner responds to that argument by purporting to identify (Br. 44) a "host" of federal and state statutes that contain as an element or sentencing factor a loss threshold of at least $10,000. But his list (Pet. Br. App. 1a-12a) shows the opposite of what he intends: In adding a category of crimes involving "fraud or deceit," Congress could not have meant to bring within the scope of Section 1101(a)(43) only a tiny handful of federal offenses and an odd patchwork of offenses in barely half the States.

a. The list of federal fraud or deceit crimes that petitioner identifies as being included within his reading of Subparagraph (M)(i) is vanishingly small. From the universe of federal fraud offenses, he identifies (Pet. Br. App. 1a) only three that have a purported loss threshold of more than $10,000: 18 U.S.C. 668 (theft by fraud of a

major artwork worth at least $100,000); 18 U.S.C. 1031 (contract fraud against the United States); and 18 U.S.C. 1039(d) (enhanced penalty for certain frauds in obtaining confidential phone records).

None of the three statutes petitioner cites involves—or, since 1994, has involved—a threshold of $200,000 or $10,000. So none of them corresponds to the criteria established by Subparagraph (M)(i) in either 1994 or 1996. The only loss threshold contained in Section 1031—a sentence enhancement for a "[m]ajor fraud against the United States"—is some 50 times greater than the current threshold in Subparagraph (M)(i).[8] Similarly, the loss threshold for a case involving the theft of a major artwork under Section 668 is 10 times the current amount in Subparagraph (M)(i).[9]

The third provision petitioner identifies, Section 1039, relates to fraud in connection with obtaining confi-

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[8] The actual offense in Section 1031(a) does not include any element requiring a loss. The offense occurs when a defendant executes a scheme to defraud the United States in connection with a government contract or subcontract worth at least $1 million. 18 U.S.C. 1031(a)(1). There need not be *any* loss to the United States, much less one exceeding a specific threshold. See, *e.g.*, *United States* v. *Reitmeyer*, 356 F.3d 1313, 1320 (10th Cir. 2004) (holding that Section 1031(a)(1) "does not require an individual to actually obtain money in order to 'execute' a scheme to defraud the United States"). Section 1031(b) provides for an increased statutory fine when the gross loss to the government exceeds $500,000, 18 U.S.C. 1031(b), and Section 1031(d) contemplates that a court might impose a fine of "up to twice the amount of the gross loss," 18 U.S.C. 1031(d).

[9] It is not clear from the face of 18 U.S.C. 668 whether the prohibited conduct would be "theft" under Section 1101(a)(43)(G), whether it would be "fraud or deceit" under Section 1101(a)(43)(M)(i), or whether it could be both. See *In re Garcia-Madruga*, 24 I. & N. Dec. 436, 438-440 (B.I.A. 2008) (distinguishing between "theft" and "fraud" offenses in Section 1101(a)(43) on the basis of consent to a taking of property).

dential phone records information, and he refers to a sentence enhancement that is triggered by "a pattern of any illegal activity involving more than $100,000." 18 U.S.C. 1039(d). But that monetary amount is not necessarily the loss that victims suffer, and in any event it far exceeds the loss threshold in Subparagraph (M)(i). Furthermore, because Section 1039 was first enacted in 2007, see Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, § 3(a), 120 Stat. 3569, it could not have been a statute that Congress had in mind when it enacted and later amended Subparagraph (M)(i).

Petitioner (Br. 46) and one of his amici (NACDL Br. 16) also mention the possibility that a jury could make a finding of loss as a predicate for a fine under 18 U.S.C. 3571(d), which provides an alternative maximum fine, for offenses involving pecuniary gain or loss, of "not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." In the case of a felony, however, where the default maximum fine is $250,000, there would be no need for that alternative maximum unless the loss exceeded $125,000, see 18 U.S.C. 3571(b)(3)—far in excess of the $10,000-loss threshold in Subparagraph (M)(i). Moreover, Congress would have had no reason to expect when it enacted and then amended Subparagraph (M)(i), years before this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Jones* v. *United States*, 526 U.S. 227 (1999), that juries would make loss findings for use in calculating alternative maximum fines. Indeed, even now it is not clear that such a fine must be based on a jury's finding of loss. See *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009) (listing the "imposition of statutorily prescribed

fines and orders of restitution" as among the functions performed by trial judges to which "*Apprendi*'s rule" may not extend).

Petitioner's flawed list of federal offenses is underwhelming in isolation, but it is especially revealing when compared with the many kinds of federal fraud offenses that, no matter how massive in execution, would be categorically excluded from being an aggravated felony under his reading. Those offenses include not only the significant provisions at the root of petitioner's own conspiracy conviction—18 U.S.C. 1341 (mail fraud), 1343 (wire fraud), and 1344 (bank fraud)—but also nearly all of the other significant criminal fraud provisions invoked by the federal government. See, *e.g.*, 18 U.S.C. 371 (conspiracy to defraud the government), 666 (theft in federally funded programs), 1028 (fraud in connection with identification documents), 1029 (fraud in connection with access devices), 1030 (fraud in connection with computers), 1347 (health care fraud), and 1348 (securities fraud).

Thus, in the federal context, comparing the extensive list of excluded offenses with the very few that could be covered by petitioner's approach (albeit not at the $10,000 threshold, and not in ways that Congress would have contemplated) amply bears out the court of appeals' conclusion that petitioner's approach would render Subparagraph (M)(i) "largely inoperative." Pet. App. 25a; see also *id.* at 48a (Board decision); *In re Babaisakov*, 24 I. & N. Dec. 306, 314-315 & n.6 (B.I.A. 2007). The strikingly underinclusive assortment of federal fraud offenses that would be included in Subparagraph (M)(i) under petitioner's reading—even after Congress lowered the threshold to only 5% of its former level in 1996—makes his construction wholly implausible as a matter of congressional intent. Among all the aliens who had been con-

victed of federal fraud offenses by 1994 or 1996, it is absurd to think that Congress's use of the phrase "involves fraud or deceit" was intended to apply only to those who had stolen major works of art worth at least $100,000, or had qualified for an enhanced sentence for a subcategory of procurement fraud under 18 U.S.C. 1031(b). Adopting petitioner's reading of Subparagraph (M)(i) would effectively mean that Congress had used an elephant-sized hole to house a mouse, which has no more to recommend it as a reasonable construction of a statute than the reverse form of disproportionality. Cf. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001); see *Hayes*, 129 S. Ct. at 1089 (rejecting defendant's interpretation of definition of "misdemeanor crime of violence" in part because it would not include federal misdemeanors).

b. Petitioner also provides (Pet. Br. App. 1a-12a) a list of state crimes that purportedly qualify under his construction of Subparagraph (M)(i). But that list of scattered provisions in only 28 States has its own flaws, and would not in practice reflect the sort of "bright line test" that he promises would be "easy to administer and apply." Pet. Br. 47; see also *id.* at 43, 44, 47.

Petitioner's list only reinforces the court of appeals' observation that "[m]ost fraud statutes * * * do not contain loss as an element or require that a jury find loss or a defendant plea to a specific loss amount." Pet. App. 25a. Nearly half of the States are entirely unrepresented in petitioner's list even now. See *Hayes*, 129 S. Ct. at 1087 & n.8 (rejecting interpretation of "misdemeanor crime of domestic violence" that "would have been a dead letter in some two-thirds of the States from the very moment of its enactment" and would still be inapplicable in "about one-half of the States" today) (quotation marks omitted).

Some States, moreover, are represented by only a single kind of offense—and sometimes not even an offense in the heartland of "fraud," but rather a post-1994 creation like identity theft. See, *e.g.*, N.J. Stat. Ann. § 2C:21-17(c)(2) and (3) (West Supp. 2008). Many of the offenses are "theft" offenses that may be covered by Subparagraph (G) rather than Subparagraph (M)(i). See note 9, *supra*. And the vast majority of the dollar thresholds do not come from offense definitions themselves, but from felony-classification schemes, in which the thresholds vary widely from State to State. Only 11 States in petitioner's list (Connecticut, Florida, Illinois, Iowa, Maine, Montana, Oregon, Pennsylvania, Tennessee, Vermont, and Wisconsin) have any $10,000 thresholds.

Fundamentally, petitioner's list reveals a patchwork of coverage, where many million-dollar frauds would fail to qualify in most States, while $11,000-frauds would qualify in others, but only when felony-classification brackets were appropriately aligned and addressed by juries. While some "state-by-state disparity" might well be expected when Congress has defined an aggravated felony in "generic terms," *Lopez* v. *Gonzales*, 549 U.S. 47, 58-59 (2006), petitioner's reading makes it far too unlikely that a criminal alien's conviction for fraud or deceit would be accompanied by a jury finding that would establish a loss exceeding $10,000. By contrast, the national "uniformity" that petitioner purports to seek (Br. 52-53) will be much easier to achieve if immigration courts are able to ask and answer one consistent question across all kinds of fraud convictions: Did the loss to the victims exceed $10,000?

3. Tacitly conceding the narrow and haphazard nature of the coverage of fraud or deceit offenses provided by his reading of the statute, petitioner claims (Br. 45)

that the lack of breadth could be counterbalanced if prosecutors would simply *act as if* the amount of loss were an element of fraud offenses, thereby laying the groundwork for potential immigration proceedings implicating the aggravated-felony definition. He proposes (*ibid.*) that the government "simply * * * need[s] to act in a more coordinated fashion to secure removal of targeted aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court." But the proposition that criminal prosecutions and immigration proceedings should be "more coordinated" to remedy the problem posed by petitioner's reading is flawed for several reasons.

First, as a solution to the narrow coverage of "fraud or deceit" crimes provided under his reading of Subparagraph (M)(i), any increased coordination would come far too late. It could be implemented only prospectively in new prosecutions initiated in the shadow of a decision from this Court rejecting the approach to calculating loss that is currently used by the Board and approved by several courts of appeals. A prospective-only solution would run counter to Congress's manifest intention when it expanded the definition of "aggravated felony" in 1996 and expressly made the new definition applicable to prior convictions. See 8 U.S.C. 1101(a)(43) (final sentence) ("Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). Congress plainly intended the provision to be effective even when applied to aliens who were convicted before prosecutors could have decided to alter their typical practices in anticipation of collateral immi-

gration consequences to which defendants might be exposed.

Second, even in the case of federal criminal proceedings, Congress has specifically and repeatedly acted to prevent criminal proceedings from being altered in order to effect the immigration consequences of a conviction. For example, to eliminate judicial intrusion in matters of deportation, the Immigration Act of 1990 expressly abolished a criminal sentencing judge's pre-existing authority to make a recommendation against deportation to the Attorney General. See § 505(a), 104 Stat. 5050. Later, in IIRIRA, Congress responded to judicial decisions that had interpreted 18 U.S.C. 3583(d) (permitting supervised release "subject to deportation") as providing for judicial orders of deportation, by clarifying that a hearing before an immigration judge is the "exclusive procedure" for determining whether an alien may be deported from the United States. See IIRIRA § 304(a)(3), 110 Stat. 3009-589; 8 U.S.C. 1229a(a)(3); see also, *e.g.*, *United States* v. *Romeo*, 122 F.3d 941, 942-944 (11th Cir. 1997). In doing so, Congress demonstrated its intent to foreclose criminal trial courts from involvement in determinations about the immigration consequences of convictions. Especially against that background, it makes no sense to propose that prosecutors and judges in criminal proceedings should be hampered by matters that are not the subject of those proceedings simply to make it easier for collateral immigration-specific issues to be later "sorted out in Immigration Court." Pet. Br. 45.[10]

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[10] Petitioner suggests (Br. 45) that his proposed solution would be akin to the process that the government used of submitting "sentencing 'facts'" to juries in the period between this Court's decisions in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Of course, the factors that led the government to

Third, petitioner's suggestion (Br. 45) that "the government[]" should "insist[] upon loss amounts in plea agreements or in guilty verdicts" is a non-starter with regard to state criminal proceedings. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 933 (1997) (quoting *New York* v. *United States*, 505 U.S. 144, 188 (1992)). Indeed, such reliance on state executive officials to implement federal immigration policy would implicate federalism concerns, by imposing costs on state governments and diffusing accountability for enforcement of immigration law. See *id.* at 922-923, 928.

C. Because The Amount Of Loss Need Not Be An Element Of A Fraud Offense Under Subparagraph (M)(i), It Need Not Be Established Under A "Categorical Approach" Akin To That In *Taylor* And *Shepard*

Petitioner's principal argument is that, because an alien must be "*convicted* of [a] deportable offense," the "categorical approach" that was "summarized in" *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), is the "uniformly required method for determining whether a particular offense falls within a removable category." Pet. Br. 36. But neither the INA, this Court's prior cases, nor the Board's prior practice establishes that the loss component of Subparagraph (M)(i) (or other qualifying criteria in other provisions of Section 1101(a)(43)) must be satisfied in accordance with the categorical method that this

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undertake such a considerable burden in anticipation of a need to preserve the *criminal* convictions entered in the very same proceedings from potential *constitutional* infirmities are not present in this case, which involves collateral issues in future civil immigration proceedings.

Court has applied in the context of recidivism enhancements in criminal-sentencing proceedings.

As the Attorney General has determined, the INA is "silent on the precise method that immigration judges and courts should use to determine if a prior conviction" renders an alien removable from the United States, and he has reasonably decided not to mandate the categorical approach for *all* criteria that define aggravated felonies under Section 1101(a)(43). *In re Silva-Trevino*, 24 I. & N. Dec. 687, 693 (A.G. 2008) (addressing crimes involving moral turpitude). And the Board has specifically declined to follow the categorical approach for the loss threshold in Subparagraph (M)(i). *In re Babaisakov*, *supra*.

1. The INA does not mandate a categorical approach

As discussed above, the text and structure of Section 1101(a)(43) demonstrate that the amount of loss need not be an element of an aggravated-felony offense under Subparagraph (M)(i). So too do the practical consequences of petitioner's contrary reading, which would dramatically narrow the provision's reach in ways that Congress could not have intended.

a. Petitioner nevertheless claims that *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), has already "settled any debate on applicability of [the] categorical approach to aggravated felony determinations." Pet. Br. 36 (internal quotation marks omitted; citing Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 1004 (2008) (Sharpless)). That cannot be true; there was no "debate" in *Duenas-Alvarez* about whether to apply a categorical approach to the aggravated-felony provision at issue there, which referred in

relevant part to "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). The parties in the case did not contend otherwise, and this Court did not itself construe the statute on that question. Instead, the Court simply observed that "the lower courts uniformly have applied the approach this Court set forth in *Taylor*." *Duenas-Alvarez*, 549 U.S. at 186. Of course, there is no such uniformity with regard to the question in this case, since three circuits, including the court below, have endorsed departures from the categorical approach "when deciding how to classify convictions under [the INA] criteria that go beyond the criminal charge—such as the amount of the victim's loss [under Subparagraph (M)]." *Ali* v. *Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008), petition for cert. pending, No. 08-552 (filed Oct. 23, 2008); see *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 177-178 (5th Cir. 2008); Pet. App. 22a-26a.

More importantly, because the statement in *Duenas-Alvarez* did not even purport to establish this Court's view of "the *best* reading" of Section 1101(a)(43)(G), it could not, *a fortiori*, have constituted a holding that "the statute unambiguously requires" application of the categorical approach, preventing any contrary determination by the Attorney General, the Executive Branch official entrusted with responsibility for interpreting the INA. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 984-985 (2005).[11]

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[11] In arguing that a categorical approach generally applies to Section 1101(a)(43), petitioner also relies (Br. 2, 36) on *Lopez* v. *Gonzales*, *supra*, and *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). While those decisions both tacitly employed a categorical approach, neither cited *Taylor* or *Shepard*, or stated that a categorical approach was compelled by Section 1101(a)(43). Moreover, both cases dealt with aspects of the

b. Petitioner also contends (Br. 36-37) that "the categorical approach" has a "pedigree in the immigration context" that made it "controlling in determining whether a conviction fell within a deportable category." In fact, the early cases he cites were strictly limited to a single area of deportability or excludability: that based on a conviction for a "crime involving moral turpitude" (CIMT). See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022, 1022-1023 (2d Cir. 1931); *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 862-863 (2d Cir. 1914).[12]

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aggravated-felony definition that were directly incorporated from definitional sections of the federal criminal code (the definition of a "crime of violence" in 18 U.S.C. 16 and the definition of a "drug trafficking crime" under 18 U.S.C. 924(c)). *Lopez*, 549 U.S. at 52-53; *Leocal*, 543 U.S. at 4-5.

[12] Petitioner's additional sources (Br. 37-38) show only that a kind of categorical analysis was established for CIMTs. See *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 656 (1953); see also Sharpless 994-995 & nn.56-57. Those sources cite no case applying a "categorical approach" outside the CIMT context before the 1988 enactment of the original "aggravated felony" deportation ground, and they cite only one case before the 1994 amendment adding the "fraud or deceit" definition of aggravated felony. See *id.* at 996 n.61. That case, *In re Alcantar*, 20 I. & N. Dec. 801 (B.I.A. 1994), applied a categorical approach in assessing the "crime of violence" aggravated-felony provision mainly because it was defined by federal criminal statutes (including the phrase "has as an element"), to which the courts had already applied the categorical approach. See *id.* at 809-812. Meanwhile, at least two other decisions show that the Board was in fact willing to look to facts underlying certain convictions to determine whether aliens were deportable. See *In re Chow*, 20 I. & N. Dec. 647, 649-650 (B.I.A.) (citing alien's admission in Immigration Court that a weapon was automatic to establish that firearms conviction would have rendered alien deportable), aff'd, 12 F.3d 34 (5th Cir. 1993); *In re P–C–*, 8 I. & N. Dec. 670, 671-674 (B.I.A. 1960) (apparently accepting that only the record of conviction should be considered, but taking a broad view of the record, looking to law-enforcement affidavit and

Even if Congress had contemplated that any categorical approach used in the CIMT context, but see *In re Silva-Trevino*, *supra*, might also be used with aggravated-felony definitions, that would not suggest a different result in this case. The phrase "crime involving moral turpitude" corresponds here only to the phrase "offense that * * * involves fraud or deceit" in Subparagraph (M)(i). That parallel could not resolve the question of how to satisfy *additional* limitations like the $10,000-loss threshold. The relevant backdrop for that further determination would have been the INA provisions generally governing the resolution of factual issues in deportation hearings. See 8 U.S.C. 1252(b) (1982) (providing for the "present[ation] and recei[pt] [of] evidence" by a special inquiry officer in deportation proceedings, and for an additional immigration officer to "present evidence" and to "examine * * * witnesses in the proceedings"); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("A decision of deportability need be based only on 'reasonable, substantial, and probative evidence.'") (quoting 8 U.S.C. 1252(b)(4)).

2. The considerations that supported the categorical approach in* Taylor *and* Shepard *do not apply in removal proceedings

While the categorical approach in *Taylor* and *Shepard* has some relevance to the manner in which some components of the statutory provisions at issue here might be construed, nothing in those cases mandates that it be

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laboratory analysis to determine whether substance involved in guilty plea conviction was a narcotic; noting an Attorney General opinion about an earlier statute stating that "facts must be examined upon which the violation of law is based") (quoting *In re L–*, 5 I. & N. Dec. 169, 172 (A.G. 1953)).

applied in deciding how to determine a loss under Subparagraph (M)(i).

In *Taylor*, the Court addressed the Armed Career Criminal Act, which provides a sentence enhancement for any person who violates 18 U.S.C. 922(g) after three prior convictions for serious drug offenses or violent felonies, including, as relevant in that case, "burglary." See 495 U.S. at 578-579; 18 U.S.C. 924(e)(2)(B)(ii). Reviewing the history and background of ACCA, the Court determined that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," namely, an offense that has "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598.

The Court then turned to the question of how to determine whether a prior conviction qualified as "burglary" under that definition. Based on the language, history, and purpose of ACCA, the Court held that it "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The Court also expressed concern about "the practical difficulties and potential unfairness of a factual approach." *Id.* at 601. It concluded that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602.

Later, in *Shepard*, the Court held that *Taylor*'s categorical approach governs the identification of generic offenses following guilty pleas, as well as convictions fol-

lowing jury verdicts, for purposes of ACCA sentencing. The Court concluded that, where a prior conviction was the result of a guilty plea, the sentencing court may look only to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. A plurality of the Court explained that it was "limit[ing] the scope of judicial factfinding on the disputed generic character of a prior plea" in order "to avoid serious risks of unconstitutionality" presented by the need—in light of the intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)—for a jury to find "any disputed fact essential to increas[ing] the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25-26.

Taylor and *Shepard* govern the range of documents that a court may consult to determine whether a defendant's criminal record merits imposition of an enhanced sentence under ACCA. But those holdings are not controlling with respect to the INA—a different statute with different language, purposes, and history, which support and invite a more factual inquiry when determining whether a prior conviction qualifies as a removable offense.

a. The "potential unfairness of a factual approach" —first identified in *Taylor* and later elaborated in *Shepard* by the plurality—is rooted in the need to prevent judges applying ACCA in criminal-sentencing proceedings from assuming a role constitutionally reserved for jurors. *Taylor*, 495 U.S. at 601-602; *Shepard*, 544 U.S. at 24-26. Those Sixth Amendment concerns are not present in civil immigration proceedings. *Lopez-Mendoza*, 468 U.S. at 1038 (observing that "various protections that apply in the context of a criminal trial do not apply in a

deportation hearing"); see *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)).

b. The "practical difficulties inherent in looking into underlying circumstances" identified by *Taylor* and *Shepard* were concerns of *judicial* economy: saving sentencing courts the burden of collateral trials. *Shepard*, 544 U.S. at 20, 23; *Taylor*, 495 U.S. at 601-602. Whether such "practical difficulties" militate against a more searching inquiry in the context of administrative removal proceedings, however, is a question for the agency itself. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978) ("[T]he agency should normally be allowed to exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence.") (internal quotation marks and citations omitted). Here, Congress has assigned the Attorney General primary responsibility for conducting removal proceedings, and he has delegated that authority to the Board, members of which act as his delegates in the cases that come before them. See 8 U.S.C. 1103(g); 8 C.F.R. 1003.1(a)(1); *Negusie*, 129 S. Ct. at 1163-1164. The Attorney General and the Board in turn have expressly considered whether to undertake a broader factual inquiry in removal proceedings in particular situations.

In *In re Babaisakov*, *supra*, the Board addressed whether it should consider matters beyond the elements of the offense in precisely this context, and did not note any "practical difficulties," concluding that extrinsic evidence might be considered, rather than limiting its review to the record of conviction. The Board held that in

aggravated-felony cases under Subparagraph (M)(i) an adjudicator must make: (1) a categorical inquiry into whether the conviction is for a crime involving fraud or deceit, and (2) an "ordinary evidentiary inquiry" into whether the loss exceeded $10,000. 24 I. & N. Dec. at 322. The Board explained that the categorical and modified categorical approaches under *Taylor* apply when the relevant statute "demands a focus exclusively on the elements of a prior conviction," but that they do not apply to the "nonelement" factor of victim loss. *Id.* at 309. The Board disagreed with courts of appeals that "constrain[] [the] inquiry to the record of conviction if the search involves aspects of the crime that go beyond the elements of the offense." *Id.* at 317. Accordingly, the Board held that, where an aggravated-felony determination requires a factfinder to establish a nonelement factor, the factfinder may look to "any evidence, otherwise admissible in removal proceedings, including witness testimony," bearing on that factor. *Id.* at 320-321.

More recently, the Attorney General, in a published opinion addressing inadmissibility, found "the Board's analysis in [*Babaisakov*] persuasive and appropriate" to the CIMT context as well. *Silva-Trevino*, 24 I. & N. Dec. at 702. He expressly considered "whether the administrative burdens associated with inquiries beyond the record of conviction should preclude such inquiries * * * and conclude[d] that those burdens should not." *Ibid.* Although taking into account the potential effects on "administrative efficiency," the Attorney General concluded that an "inquiry beyond the record of conviction would result in more accurate determinations of who falls within the scope of the statute, and would better accord with the statute's demands for individualized adjudications." *Ibid.*; see also *In re Gertsenshteyn*, 24 I. & N.

Dec. 111, 116 & n.8 (B.I.A. 2007) (acknowledging the existence of some burden on the agency in determining whether a prior conviction was "committed for a commercial advantage" under Section 1101(a)(43)(K)(ii), but noting that it is a similar inquiry "as to whether an offense is a 'particularly serious crime' for purposes of the bar to asylum and withholding of removal."), vacated and remanded, 544 F.3d 137 (2d Cir. 2008); *In re Mendez-Moralez*, 21 I. & N. 296, 303 n.1 (B.I.A. 1996) (observing that immigration judges and the Board "look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted."). Nothing in the INA forecloses that reasonable approach adopted by the Attorney General and the Board.

3. The Attorney General's approach preserves the appropriate burden of proof for immigration proceedings

Contrary to petitioner's assertions (Br. 32-35), allowing immigration judges to consider documents prepared at a criminal sentencing does not lower the burden of proof in immigration proceedings. As the Board has correctly determined, evidence proving facts under a preponderance standard may in certain situations also establish proof that is clear and convincing. *Babaisakov*, 24 I. & N. Dec. at 319-320. But the Board and the Attorney General have shown appropriate sensitivity to the different burdens of proof in the two different kinds of proceedings. The Attorney General cautioned in *Silva-Trevino* that "allowing inquiry beyond the record of conviction does not mean that the parties would be free to present 'any and all evidence bearing on an alien's conduct leading to the conviction.'" 24 I. & N. Dec. at 703.

Rather, "[t]he sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Ibid.*; see also *Babaisakov*, 24 I. & N. Dec. at 321.[13]

It is petitioner's position of insisting that the loss threshold be found by the criminal jury or necessarily admitted in a guilty plea that would effectively alter the government's burden of proof in civil removal proceedings, raising it to one of beyond a reasonable doubt. That would be inconsistent with the INA, which provides that:

> In the [removal] proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. 1229a(c)(3)(A).

Moreover, petitioner's concern (Br. 33-35) that restitution orders and sentencing considerations may generally include considerations "beyond what was even charged to 'relevant conduct'" is rebutted by the Board and courts of appeals, which have appropriately required the loss to be tied to the specific counts covered by the conviction.[14]

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[13] The Attorney General and the Board have thus indicated their awareness of, and intention to avoid, the problem of readjudicating guilt—a problem petitioner stresses (Br. 20, 47), but which simply does not arise in this case.

[14] Consistent with the Board's consideration of the different burdens of proof and whether the loss is tied to the convicted conduct, courts of appeals, including the court below, have required that the loss be tethered or tied to the conviction on which removability is based before removability can be established. See, *e.g.*, Pet. App. 16a-19a; *Obasohan* v. *United States Att'y Gen.*, 479 F.3d 785, 789 & n.9 (11th Cir. 2007);

D. Any Statutory Ambiguity Must Be Resolved By Deferring To The Attorney General's Reasonable Interpretation

As discussed above, the text and structure of Section 1101(a)(43) establish that the amount of loss in Subparagraph (M)(i) need not be an "element" of the underlying aggravated-felony offense. And petitioner's contrary reading would dramatically and inappropriately constrain the statute's scope on the basis of a categorical approach that was developed in a different context to satisfy constitutional and other concerns that are not present here. To the extent, however, that the Court concludes that the INA is ambiguous in relevant part, it should defer to the Board's clear determination that, in Subparagraph (M)(i), "the $10,000 loss threshold is a limiting or aggravating factor that need not be tied to an element of any criminal statute." *Babaisakov*, 24 I. & N. Dec. at 316; see Pet. App. 48a. As discussed above, the Board's interpretation, which has been approved by the Attorney General, is at the very least reasonable.

Although it is well established that the Attorney General's reasonable interpretation, and thus the Board's interpretation, of the INA is entitled to substantial deference from courts, see *Negusie*, 129 S. Ct. at 1163-1164, petitioner urges the Court to impose a narrow construc-

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Conteh v. *Gonzales*, 461 F.3d 45, 61-62 (1st Cir. 2006), cert. denied, 127 S. Ct. 2003 (2007); *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 106-108 (3d Cir. 2006); *Knutsen* v. *Gonzales*, 429 F.3d 733, 736-740 (7th Cir. 2005); *Munroe* v. *Ashcroft*, 353 F.3d 225, 227 (3d Cir. 2003); *Khalayleh* v. *INS*, 287 F.3d 978, 979-980 (10th Cir. 2002). Therefore, contrary to petitioner's contention (Br. 47), the requirement that the loss be tethered or tied to the offense is not "uncharted territory." Rather, it is consistent with the text of the statute, which requires a fraud or deceit offense "in which" the loss to the victim exceeds $10,000.

tion favoring aliens (Br. 48-50) and to conclude that *Chevron* deference is inapplicable here (Br. 51-56).

1. Contrary to petitioner's argument (Br. 48-50), the Attorney General's reasonable construction of the statute should not be disregarded based on the proposition that ambiguities should be resolved in favor of the alien.[15] Even the rule of *criminal* lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463-464 (1991) (internal quotation marks, brackets, and citations omitted). In the immigration context, any application of similar principles must come only *after* the Attorney General has had an opportunity to interpret the relevant statutory provision and the courts have given appropriate deference to that interpretation. Any other approach would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance. Thus, in *Negusie*, the alien urged that a statutory provision should be construed in his favor and the Court concluded that the provision was ambiguous, 129 S. Ct. at 1164, but it did not then adopt a narrowing construction that favored the alien. Instead, it remanded to the agency to adopt its own construction. *Id.* at 1167. Here, administrative deference likewise takes prece-

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[15] In support of his argument, petitioner quotes (Br. 50) James Madison's Report on the Alien and Sedition Acts, which described banishment as a "punishment," but he omits mention of Madison's concern that banishment was being imposed in that context "on persons *convicted of no personal offence* against the laws of the land." James Madison, *Writings* 623 (Jack N. Rakove ed. 1999) (emphasis added). That is certainly not the case here.

dence over petitioner's proposal to resolve ambiguities in his favor, although, in light of *Babaisikov*, there is no need to remand to determine the Board's formal construction of the loss threshold in Subparagraph (M)(i).

2. Petitioner suggests (Br. 52) that deference to the Board's published decision in *Babaisakov* is inappropriate because that decision marked a change in the law and came after his sentencing proceeding.[16] In fact, the construction of Subparagraph (M)(i) articulated in *Babaisakov*—which essentially mirrored the one reached in petitioner's own proceeding before the Board, see Pet. App. 48a—does not raise retroactivity concerns. Petitioner does not even attempt to articulate how he satisfies the many variables that would be relevant to a retroactivity inquiry, including that he "relied on the former rule." *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). It is difficult to see how he relied at the time of his sentencing on the prior practice that he attributes to the Board. By his own account, he now claims (Br. 35) to have "entered into" the sentencing stipulation on the assumption that "the loss issue" was being "reserv[ed]" for resolution in the "immigration proceedings." But he also argues exactly the opposite: that the *only* "loss" determination that can ever matter in immigration proceedings is one that is made *before* sentencing, during the guilt phase, in the prior criminal proceeding.

3. Petitioner also argues (Br. 54) that *Chevron* is inapplicable here because the aggravated-felony definition is "part of a federal criminal statute * * * punishing illegal reentry." That assertion is based on the fact

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[16] Petitioner did not argue retroactivity concerns in the court of appeals or his petition-stage briefs in this Court.

that an aggravated-felony conviction can affect an alien's sentence for illegal reentry following a prior removal. 8 U.S.C. 1326. Generally, the maximum sentence for illegal reentry is a two-year term of imprisonment, but that term can be increased to 20 years if the prior removal was subsequent to a conviction for an aggravated felony, see 8 U.S.C. 1326(a) and (b)(2)—a factor this Court has held is not an element of the offense. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 226-227 (1998).[17] Petitioner's argument fails for several reasons.

First, the aggravated-felony definition at issue here is unlike the ones addressed in the decisions on which petitioner relies (Br. 55). In those cases, the relevant components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code (the definition of a "crime of violence" in 18 U.S.C. 16 and the definition of a "drug trafficking crime" in 18 U.S.C. 924(c)(2)). *Lopez*, 549 U.S. at 52-53; *Leocal*, 543 U.S. at 4-5. Here, by contrast, the relevant definition is entirely contained in Section 1101(a)(43), in the INA itself.

Second, the principal purpose of Subparagraph (M)(i) and the other self-contained definitions in Section 1101(a)(43) is to provide a basis for civil removability determinations. Petitioner's rationale would allow the tail to wag the dog, by denying the Attorney General the deference to which this Court has held he is entitled just because the definition of aggravated felony entrusted to his application under the INA might one day be of collat-

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[17] The United States Sentencing Guidelines authorize an eight-level upward adjustment in a defendant's offense level for illegal reentry if the defendant was convicted of an "aggravated felony," as defined in the INA, before a prior removal from the United States. § 2L1.2(b)(1)(C) & comment. (n.3(A)).

eral relevance in a separate criminal prosecution. In an analogous context, the Court has held that agency interpretations issued in the administration of a regulatory statute are entitled to deference even though the statute may sometimes be enforced in criminal prosecutions. See *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 703, 704 n.18 (1995); see also *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (granting *Chevron* deference to an SEC rule in a criminal case). Consistent with those principles, the lower courts have correctly recognized that the Board is owed deference for its interpretations of other aggravated-felony definitions found to be ambiguous, such as the reference to "sexual abuse of a minor" in 8 U.S.C. 1101(a)(43)(A).[18]

Deferring to the Board's interpretation here would obviate any potential for different constructions in the removal and criminal-sentencing contexts. In either context, the same construction would apply: the loss threshold is not an element of the crime itself, but instead qualifies which criminal convictions involving fraud or deceit are to be classified as aggravated felonies. There would be no "*Apprendi* problem" (Pet. Br. 44, 53) in any subsequent criminal proceeding under Section 1326 for illegal entry—even assuming *Almendarez-Torres*, *supra*, does not control the resolution of that question—as long as the jury in that later proceeding made a determination of the

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[18] See, *e.g.*, *James* v. *Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008); *Gattem* v. *Gonzales*, 412 F.3d 758, 764 (7th Cir. 2005); *Espinoza-Franco* v. *Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005); *Bahar* v. *Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 940 (7th Cir. 2001). But see *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1157 & n.7 (9th Cir. 2008) (finding *Chevron* deference inapplicable, in part because the statutory reference to "sexual abuse of a minor" is not ambiguous).

loss associated with the prior offense beyond a reasonable doubt (or the defendant waived his right to have that question decided by a jury). Cf. *Hayes*, 129 S. Ct. at 1087.

E. The Loss To Victims In Petitioner's Offense Vastly Exceeded $10,000

In addressing whether his offense was one in which the loss to victims actually exceeded $10,000, petitioner says almost nothing aside from the fact that his criminal jury was not required to find an amount of loss associated with the conspiracy of which he was convicted.

Petitioner claims (Br. 35) that "both the government and the District Court agreed at sentencing that [he] had not caused a loss in excess of $10,000." But that misstates the record. The transcript of the sentencing proceeding reveals that the government and the district court simply agreed with defense counsel's statement that "the entire $683 million loss" was associated with the fraud offense, and that, because petitioner was jointly and severally liable for "the entire scheme," there had been no separate determination that he was personally "responsible for" any particular portion of that loss. J.A. 97a-98a. Thus, the prosecutor agreed with defense counsel's statement that there was no "finding of over [$]10,000 specific to this defendant," because, as the prosecutor said, $683 million was "[j]ust the loss" associated with the fraud. *Ibid.*; see also J.A. 118a (portion of judgment stating that the "Total Loss" was $683,632,800.23).

Because each conspirator is responsible for acts within the scope of a conspiracy, see generally *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997), there was no criminal-law reason to parcel out responsibility for vic-

tims' losses among individual conspirators. Moreover, petitioner's requested instruction on "loss" (Br. 41) was also unrelated to the aggravated-felony definition at issue in the immigration proceeding, because the "loss" under Subparagraph (M)(i) must, under any reading, relate to one of the nouns that precedes it—either the "offense," the "fraud," or the "deceit"—and not just the alien's own personal role. Petitioner does not argue otherwise.

There is no evidence to suggest that petitioner's sentencing stipulation and restitution order were based on other "relevant conduct" (Pet. Br. 33-34), or "unreliable evidence of what actually happened in [his] past conviction" (ACLU Br. 17), or anything else petitioner and his amici believe in the abstract to be inappropriate (Asian Am. Justice Ctr. Br. 18 (criticizing restitution orders and pre-sentence investigation reports as unreliable)). The sentencing stipulation and restitution order are thus persuasive evidence that petitioner was convicted of an offense "in which the loss to the victim or victims exceeded $10,000." Indeed, since petitioner has never in the course of his immigration proceedings suggested that the actual loss was anything less than those massive amounts, it was appropriate for the Board to conclude that there was clear and convincing evidence that his conviction fell within the definition of an aggravated felony under Subparagraphs (M)(i) and (U).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
DONALD E. KEENER
JENNIFER J. KEENEY
W. MANNING EVANS
HOLLY M. SMITH
ANDREW C. MACLACHLAN
SAUL GREENSTEIN
ERICA B. MILES
Attorneys

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APPENDIX

1. 8 U.S.C. 1101(a)(43) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

---

[5] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

---

[6] So in original. Probably should be followed by a semicolon.

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. 1227(a)(2)(A) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

* * * * *

3. 8 U.S.C. 1326(a) and (b) provide:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such ali-

en shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

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[1] So in original. The period probably should be a semicolon.

REPLY BRIEF

No. 08-495

IN THE

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

Attorneys for Petitioner

222302

COCKLE PRESS
(800) 274-3321 • (800) 359-6859

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REPLY FOR PETITIONER

In urging that loss under 8 U.S.C. §1101(a)(43)(M)(i) must be determined as a factual matter in removal proceedings, the government runs roughshod over the plain statutory language requiring conviction of an aggravated felony. This statutory requirement is satisfied either by (1) conviction of an offense defined to include the requirements of the aggravated felony definition in all cases—the formal categorical approach, or (2) conviction of an offense that may include the requirements of the aggravated felony definition in a particular case, if the guilty plea or jury verdict in that case shows the defendant to have been convicted of the aggravated felony requirements—the modified categorical approach.

The conviction here fails both tests under the categorical approach. First, there is no dispute that the formal categorical approach has not been satisfied. Second, with respect to the modified categorical approach, a jury convicted Mr. Nijhawan and the jury was never instructed to find any loss. Accordingly, Mr. Nijhawan was never convicted of the required loss. At the same time, this result leaves the government free in a proper case to urge that the modified categorical approach has been satisfied, either because loss was established in a guilty plea, the method by which most criminal cases are resolved, or by an appropriate jury instruction on loss in those few criminal cases that go to trial.

Even if the statutory language is considered ambiguous on applying the categorical approach, two

controlling rules of statutory construction require that ambiguity to be resolved in the Petitioner's favor, especially since the aggravated felony provision is both a deportation ground and an integral part of a federal criminal statute. First, an ambiguity in a federal criminal statute must, under the rule of lenity, be resolved against the government. Second, deportation provisions must be narrowly construed in favor of the alien.

ARGUMENT

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE ACT REQUIRE THE ALIEN TO HAVE BEEN CONVICTED OF THE SPECIFIED LOSS IN ACCORDANCE WITH THE CATEGORICAL APPROACH

A. The Text Of Subparagraph (M)(i) Defines "Offense" To Include Loss

The government's attempt to deport Mr. Nijhawan for conviction of an aggravated felony founders on the plain language and structure of the Immigration & Nationality Act of 1952, as amended (the "Act"). While conceding that an alien must be convicted of an aggravated felony to be deportable, and apparently admitting that Mr. Nijhawan was not convicted of the required loss amount under §1101(a)(43)(M)(i), the government nevertheless seeks to sustain a departure from the categorical approach by arguing that the clause beginning with "in which" in (M)(i) constitutes a second restrictive clause, independent of the clause beginning with "that." GBr. 11. Yet the plain language of §1101(a)(43)(M)(i) incorporates the "in which" clause

within the restrictive clause beginning with "that," and this entire clause defines the offense of which an alien must have been convicted. Indeed, having the "in which" language define the preceding words within the clause beginning with "that" would be consistent with antecedent rule. *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (limiting clause modifies noun that clause follows). In other words, the loss requirement beginning with "in which" constitutes a further limitation upon "that involves fraud or deceit," and this entire restrictive clause defines "offense." Since the law requires the alien defendant to have been convicted of this defined offense and Mr. Nijhawan was not convicted of the required loss component of the definition, the removal order cannot stand.

Even accepting the government's argument that there are two separate restrictive clauses, one beginning with "that" and the other beginning with "in which," still dooms the government's argument. A restrictive clause defines the noun to which the clause refers. *The Chicago Manual of Style* §§ 5.202 at 230, 6.31, 6.36, 6.38. (15th ed. 2003) ("CMS"). If "in which" begins a separate restrictive clause and the antecedent rule is not applied, then this second restrictive clause must also restrict and define "offense," a point the government does not appear to dispute. GBr. 11, 14. Accordingly, even under the government's two restrictive clauses approach, both clauses end up defining "offense," leaving no doubt that the alien must have been convicted of fraud or deceit and the required loss.

This plain meaning is not altered by the absence of the word "element." GBr. 16. Indeed, this misconstrues

the Petitioner's argument as limited to the formal categorical approach, which focuses only on the elements of the statutory offense and requires the offense of conviction to encompass the aggravated felony definition in all cases[1] While the government suggests, *e.g.*, GBr. 17, 18, how §1101(a)(43)(M)(i) could have been better drafted to support the Petitioner's position, the words used more than suffice. By contrast, Congress certainly knew how to require facts supporting removability to be found by the Immigration Judges conducting removal proceedings, but did not do so here. Indeed, to achieve the result urged by the government, (M)(i) would have read "an offense—that involves fraud or deceit, when the loss to the victim or victims is found in removal proceedings to have exceeded $10,000."[2]

[1] To the extent that the government appears to urge that focus on the legal elements of the offense occurs only when Congress uses the word "element" in the aggravated felony definition, GBr. 16, BIA precedent is to the contrary. *See, e.g., Matter of Espinoza*, Int. Dec. 3902 at 8 (BIA 1999)(en banc) (legal elements determine whether misprision is an offense relating to obstruction under subparagraph (S) though "element" not used in this aggravated felony definition).

[2] While the government cites portions of the Act purportedly imposing adverse immigration consequences based upon commission and not conviction of an aggravated felony, GBr. 17n.5, this merely demonstrates that Congress knew how to differentiate between commission and conviction and required the latter for deportation. The cited examples, however, do not bear close scrutiny. *See* 8 U.S.C. §1226(d)(1)(A)—(C) (import is to identify aliens convicted of an aggravated felony for removal proceedings after their release from criminal custody; 8 U.S.C. §1231(i)(1) (refers to (Cont'd)

The government's reliance upon *Hayes v. United States*, 129 S.Ct. 1079 (2009) is also misplaced. *Hayes* concerned a prosecution under 18 U.S.C. §922(g)(9), which prohibits any individual who has been convicted of a "misdemeanor crime of domestic violence," as defined in 18 U.S.C. §921(a)(33)(A), from owning a firearm. At issue was whether under this statutory definition, the necessary relationship between victim and assailant had to have been established in the prior conviction or could, instead, be proved beyond a reasonable doubt in the firearms prosecution. The statutory definition in 18 U.S.C. §921(a)(33)(A) differs in several material respects from §1101(a)(43)(M)(i). First, §921(a)(33)(A)(i) expressly provides for only one element, the use or attempted use of force, while (M)(i) does not limit the elements to fraud or deceit. Second, having the phrase "committed by" modify "use" would produce the awkward expression of "committing a use." Moreover, placement of the term "committed," set off by a comma, signals a departure from the definition of offense for conviction and establishes a separate factual

(Cont'd)

"undocumented criminal aliens who have committed aggravated felonies," but must be read together with 8 U.S.C. §1231(i)(3)(A), which defines "undocumented criminal alien," as one who lacks legal status and "has been convicted of a felony or two or more misdemeanors"). Finally, 8 U.S.C. §1226(c)(1)(B) presupposes conviction, otherwise the provision would make no sense since aliens are deportable only for conviction and not commission. *See Demore v. Kim*, 538 U.S. 510, 513 (2003) (the cited section "provides that 'the Attorney General shall take into custody any alien who' is removable from this country because he has been convicted of one of a specified set of crimes").

requirement provable in the firearms prosecution unlike (M)(i). *See, e.g.*, CMS §6.31 at 248 (non-restrictive phrase set off by comma). Indeed, to resemble the definition in *Hayes*, (M)(i) would have to define an offense "that has as an element fraud or deceit, with loss to the victim found to have exceeded "$10,000."

B. Read Together (M)(i) And (M)(ii) Support The Categorical Approach

Subparagraph (M)(ii) strongly supports the Petitioner's reading of subparagraph (M)(i). Thus 26 U.S.C. §7201, the federal tax statute referenced in M(ii), is precisely the kind of statute to which the modified categorical approach normally applies since the deficiency requirement in that statute encompasses revenue losses greater and lesser than $10,000, with removability under M(ii) determined, as under M(i), by whether the required loss was established either by guilty plea or jury verdict. In other words, a guilty plea or jury verdict under a fraud statute may establish a loss greater than $10,000 even though not every conviction under the statute would yield such a loss, just as a tax deficiency exceeding $10,000 under 26 U.S.C. §7201 might be established by a guilty plea or verdict, even though this would not occur in all such prosecutions. Accordingly, requiring loss to be established by conviction in (M)(i) would be fully consistent with (M)(ii) because both contemplate application of the modified categorical approach. Furthermore, the government overlooks its own practice in tax evasion cases, the vast majority of which are resolved by guilty pleas. *See United States Attorney's Manual* §6-4.310 ("The Government

disposes of an overwhelming percentage of all criminal tax cases by entry of a plea of guilty"). Moreover, the Department of Justice has made clear that such plea agreements must include the tax loss involved in the count to which the defendant pleads guilty. U.S. Department of Justice *Criminal Tax Manual* ¶5.01[2] (plea agreements must include all provable tax loss in the case).

C. The Plain Meaning of Subparagraph (M)(i) Is Entirely Consistent With The Remainder of §1101(a)(43)

While citing provisions of §1101(a)(43) requiring a sentence of imprisonment, the government overlooks the fundamental point that a jury may well find a loss amount to convict a defendant but will not sentence a defendant to a term of imprisonment. *Cf. Oregon v. Ice*, 129 S.Ct. 711, 717 (2009) ("The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently"). Accordingly, Congress is not introducing the same concept with slightly different language, but is legislating against a historical divide between court and jury, one that counsels against departure from the categorical approach on the issue of loss under (M)(i).

Additionally, other provisions cited by the government demonstrate that Congress knew how to mandate factual findings in removal proceedings but did not use such language here. The "except" language in subparagraphs (N) and (P) is set off by a comma, and the context could hardly be clearer that this non-restrictive clause does not define the offense of which the alien defendant must be convicted. Similarly,

subparagraph (O) cites two federal statutes already having defined elements and then qualifies the definition by references to facts that, unlike the loss amount in (M)(i), a jury would never be called upon to find to convict. Similarly subparagraph (K) uses the language of "committed," as a possible qualifier, which is simply not employed in (M)(i). *Compare Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137, 145 (2d Cir. 2008) (applies the categorical approach to require that commercial advantage be established by conviction under (K)).

D. Applying The Plain Language Of (M)(i) In Accordance With The Categorical Approach Produces No Unnatural Constraint

The government places unjustified reliance upon the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, passed some two years *after* §1101(a)(43)(M)(i) was first enacted in 1994 by a different Congress. GBr. 24—26. *See O'Gilvie v. United States*, 519 U.S. 79, 89 (1996) ("[V]iew of a later Congress cannot control the interpretation of an earlier enacted statute"). Yet the actual legislative history from 1994, though admittedly sparse, is fully consistent with applying the plain language of (M)(i) in accordance with the categorical approach. *See* PBr. at 27n.14. In the end, the government's argument merely begs the question of whether a particular conviction falls within a ground of removal. Unenacted expressions of Congressional concern in 1996 about the removal of criminal aliens says

nothing about whether a particular conviction falls within a removable category enacted in 1994.[3]

With respect to the need for uniformity, GBr. 31, one consistent question will satisfy this need, namely whether the alien was convicted of a loss exceeding $10,000, a question more easily answered by resort to the alien's guilty plea or jury instructions than reconstruction of the underlying facts of the criminal case many years after the events, especially given the government's position on the full retroactivity of the aggravated felony definition as a removal ground. Indeed, when Congress assertedly mandated full retroactivity for removal purposes, Congress nevertheless legislated against the backdrop of the categorical approach and left the conviction requirement unchanged, strongly suggesting that the legislature resolved the knotty problems presented by retroactivity through the one consistent question presented above, namely whether the alien was convicted of the required loss.

While the government attempts to make much of the assertedly limited applicability of such federal statues as mail fraud, wire fraud or bank fraud, 18 U.S.C. §§1341, 1343, 1344, should the Petitioner's position be adopted, its argument ignores both the fact that the overwhelming majority of federal prosecutions under

[3] Virtually all of the cited legislative history from 1996 concerns the need for detention as part of immigration enforcement, illegal immigration or removal for violation of the immigration law, while saying nothing about the aggravated felony provisions. *See, e.g.*, S.Rep. No. 249, 104th Cong., 2d Sess at 7 (1996).

these provisions are resolved through guilty pleas and that the government, in accordance with past practice, can insist upon loss amounts in any such plea agreements. With respect to those federal statutes where loss greater than $10,000 is a statutory element, the government's skepticism on whether 18 U.S.C. §668 would fall within (M)(i) borders on the nonsensical, for this statute, phrased disjunctively, makes guilty a person "who steals or obtains by fraud" a major artwork, thus allowing federal prosecutors to charge a fraud offense under familiar criminal practice. *See, e.g., United States v. Niederberger*, 580 F.2d 63, 68 (3d Cir. 1978) ("[I]t is settled law that where a statute denounces an offense disjunctively, the offense may be charged conjunctively in the indictment," while "guilt may be established by proof of any one act named disjunctively in the statute"). As for 18 U.S.C. §1031 and §1039, both provide for enhanced penalties based upon loss, [1]and 18 U.S.C. §3571(d), which applies a significantly enhanced fine, would seem miles away from the "statutorily prescribed fine," referenced in passing by dicta from the majority opinion *Ice*, 129 S.Ct. at 719 (2009), which dealt not with enhanced fines but consecutive sentences.

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[1] While the government cites *United States v. Reitmeyer*, 353 F.3d 1313, 1320 (10th Cir. 2004) on 18 U.S.C. §1031, the government's own position in that case, seeking to avoid dismissal on statute of limitations grounds, was that this offense was not complete until the money fraudulently sought from the government was actually provided, thus putting this statute, under the government's own reading, well within M(i) under the modified categorical approach. As for 18 U.S.C. §1039, despite the government's quibble, GBr. 28, victim loss would seem to be the most logical way to read the requirement of $100,000 of illegal activity.

Thus this case is a far cry from the concerns about limited federal coverage expressed in *Hayes*, while it should not be forgotten that (M)(i) presents an aggravated felony provision not defined by reference to any federal statute. *Cf. Ice*, 129 S.Ct. at 718 (quoting from *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government."). The government's resistance to coordinated action to secure removal rests upon dubious authority. GBr. 33. Thus the elimination of judicial recommendations against deportation in 1990, some four years before enactment of (M)(i), says nothing about whether the government should seek a jury charge on loss to insure deportation in an administrative proceeding, nor does elimination of deportation in sentencing.[5] Equally absurd is the government's suggestion that the Petitioner's arguments would somehow require that state officials do anything, while the government's apparent dismay about state involvement in immigration enforcement overlooks the government's past efforts to foster just such involvement under 8 U.S.C. §1357(g), enacted as Section 287(g) of the Act by IIRIRA in 1996. *See, e.g.*,

[5] Petitioner does not contend that seeking a jury instruction on loss is constitutionally required, only that this procedure would allow the government to follow the plain language of (M)(i) and would hardly seem to place an insurmountable burden upon the government, which previously extolled just such coordinated efforts between criminal and immigration enforcement. See "85 Sentenced for criminal offenses in one day following a coordinated ICE operation in Iowa. *http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm*. (May 20, 2008).

"Delegation of Immigration Authority: Section 287(g)," *www.ice.gov/pi/news/factsheets/070622factsheet287g progover.htm* (June 22, 2007).

Additionally, with respect to state offenses, the government fails to recognize that the Petitioner has identified a majority of states, 26 in all, where loss exceeding $10,000 would always be established by conviction, thus satisfying the formal categorical approach. Brief for Petitioner ("PBr.") 1a—12a. Furthermore, this may well understate the case when the modified categorical approach is considered with respect to those state statutes that, following adoption of the Model Penal Code ("MPC"), grade such fraud offenses as theft by deception[5] based upon the amount of loss. *See* American Law Institute, Model Penal Code §§223.1 (gradation based upon loss), 223.3 (theft by deception); 1 Wayne LaFave, *Substantive Criminal Law* §1.1(a) (noting importance of MPC in development of state criminal law). Indeed, New Jersey, whose identity theft statute the government dismisses as assertedly not a heartland example, GBr. at 31 actually illustrates this point. Thus New Jersey has adopted the MPC gradation of offenses with respect to theft by deception based on loss. *See* N.J.S.A. §§2C: 20-2 (loss more than $500 but less than $75,000 a third degree crime; loss greater than $75,000 a second degree crime); 43-6 (maximum sentence for third degree crime between

[5] *Matter of Garcia-Madruga*, 24 I & N Dec. 436, 440n.5 (BIA 2008) expressly recognizes that theft by deception offenses may fall within §1101(a)(43)(M)(i).

three to five years; maximum sentence for second degree crime between five to ten years).[7]

II. THE GOVERNMENT'S REJECTION OF THE CATEGORICAL APPROACH CONTRAVENES LONGSTANDING PRECEDENT AGAINST WHICH BACKGROUND CONGRESS ENACTED THE AGGRAVATED FELONY PROVISIONS

In rejecting the categorical approach here, the government makes war on nearly a century of precedent. Grounded in sound considerations of fairness, predictability, judicial economy and efficiency, the categorical approach was developed to deal with whether an alien had been convicted of a CIMT and was later applied, without question, to subsequently added grounds of deportation based upon conviction. *See* Rebecca Sharpless, *Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 at 993-96 (2008) (hereinafter "Test"), which summarizes this development. *See, e.g., Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334-35 (BIA 1996) (en banc) ("extrinsic evidence" not allowed to determine whether alien is deportable for firearms offense conviction). Similarly, the Board applied the categorical approach to the aggravated felony classification in a series of decisions.

[7] Even those states that have not adopted the MPC still provide gradations that put fraud offenses within M(i) under the formal categorical approach or would allow a loss to established under the modified categorical approach. *See, e.g.*, Del. Code tit.11, §841(c)(1) and (3), 813 (where value of property obtained by fraud is "$1,000 or greater" offense is class G felony; where value is greater $50,000 but less than $75,000 offense is class E felony).

See, e.g., Matter of Sweetser, 22 I & N Dec. 709-712-13 (BIA 1999) and Test at 996n61 and cases cited. This application of the categorical approach occurred against the backdrop of significant changes in the immigration law with Congress leaving this fundamental rule untouched. *See, e.g., King v. St. Vincent's Hosp.* 502 U.S. 215, 221n.9 (1991) (the Court "will presume congressional understanding of . . . interpretive principles").[8]

In short, this is an area of immigration law where, despite the government's argument for a radical

[8] The government attempts to attack the foundation of the categorical approach by citing three earlier administrative decisions that hardly serve this intended purpose. *Matter of Chow* 20 I & N Dec. 647 (BIA 1993) does say in dicta that the alien admitted the firearm was automatic, but this allegation had been charged in the criminal indictment to which the alien had entered a guilty plea, while deportability was actually sustained under the amended version of the firearms ground of deportability not requiring an automatic weapon. *Compare Matter of Pichardo-Sufren*, 21 I & N Dec. at 336 (Board en banc declined to sustain a firearms deportation charge based upon alien's admission in Immigration Court that the weapon was a firearm, because record of conviction did not establish this fact, citing the same categorical approach used in CIMT determinations). *Matter of PC*, 8 I & N Dec. 670, 674, (BIA 1960) merely holds that, under New York criminal procedure, the affidavit and laboratory analysis were part of the charge on which the alien had been tried and convicted. *Matter of L*, 5 I & N Dec. 169 (A.G. 1953) involves the ground of inadmissibility for suspecting a person to be a narcotics trafficker [now 8 U.S.C. §1182(a)(2)(C)(i)], which does not even require a conviction.

departure from almost a century of precedent, "the slate is not clean." *Galvan v. Press*, 347 U.S. 522, 530 (1954) (Frankfurter, J.). Similarly, the government, which relied on the categorical approach in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), reads that decision much too narrowly, GBr. 35-36, for this Court made clear that "The case before us concerns the application of the framework just set forth [Taylor] to Luis Duenas-Alvarez. . ." Moreover, the government's citation to those provisions of the Act allowing receipt of evidence before the Immigration Court, GBr. 38, merely begs the question of whether loss must be established by conviction.

The government's attempt to brush *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) aside, GBr. 40, ignores the fact that fairness and efficiency concerns clearly animate both these decisions, while, as discussed below, Sixth Amendment concerns are also present, given the dual role played by aggravated felony definitions as part of a federal criminal statute, 8 U.S.C. §1326(b). Furthermore, while the Board and former Attorney General Mukasey may have accepted the enhanced burdens on behalf of the Executive Office for Immigration Review,* this does not address the burdens imposed upon the federal courts, the United States Citizenship & Immigration Services, United States Immigration & Customs Enforcement, and even the

* The latest statistical report after Attorney General Mukasey's departure showed a further increase in the caseload of the Immigration Courts. U.S. Department of Justice: Executive Office for Immigration Review, *FY 2008 Statistical Yearbook* at B7 (April 2009) (total new cases received: 351,477, with 291, 781 of those removal proceedings).

consular officers of the Department of State, all of whom would have to address the aggravated felony issue presented here under the entirely new paradigm of independent factual findings. *See also* Brief of Amici Curiae ACLU, *et al* at 34-37. This new paradigm would also implicate concerns of judicial economy especially as courts struggle to interpret and implement the undefined tethering test.[10]

Finally, on burden of proof, the government gets this issue backward. GBr. 43. In requiring a conviction for deportation, Congress has mandated proof beyond a reasonable doubt as the predicate to removal while the

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[10] None of the cases cited by the government in an effort to paint the tethering test as a garden variety undertaking, GBr. at 44n.14, helps the government very much. Thus *Obasohan v. United States Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007) actually rejects reliance upon a restitution order and *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005) reverses a removal order where the alien had entered a guilty plea to a count charging less than $10,000. *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2001) (Alito, J.) involved an alien who had entered a guilty plea to count charging a loss in excess of $10,000), while *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002) appears to have read the guilty plea to an amount over $10,000. While *Alaka v. Attorney Gen. of the United States*, 456 F.3d 88 (3d Cir. 2006) seems to have involved a jury conviction, the amount charged in the count of conviction was under $10,000 and the issue a jury charge on loss was not reached. Nor was the jury charge issue reached in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), *cert. denied*, 127 S.Ct. 2003 (2007), which was issued over a persuasive dissent and involved a conviction from the Second Circuit, where subsequent authority made clear that the jury had to have been instructed on loss for an (M)(i) charge to be sustained. *See Dulal-Whiteway v. DHS*, 501 F.3d 116, 128 (2d Cir. 2007).

government need only establish the existence of a conviction by clear and convincing evidence. By contrast, reliance upon sentencing or restitution determinations to establish removability, which determinations are governed by a preponderance of the evidence standard, permits removability to be based upon a standard of proof below clear and convincing evidence.

III. BOTH THE CRIMINAL RULE OF LENITY AND THE IMMIGRATION RULE OF LENITY OR NARROW CONSTRUCTION APPLY HERE

If this Court considers §1101(a)(43)(M)(i) ambiguous, two rules of construction require that ambiguity to be resolved in Petitioner's favor and preclude application of *Chevron* deference. The first is the criminal rule of lenity. The second is the rule of lenity or narrow construction for deportation statutes.

A. The Criminal Rule Of Lenity Precludes Application Of Chevron Deference Because The Aggravated Felony Definition Is Integral To A Criminal Statute

The aggravated felony definition contained in §1101(a)(43)(M) forms an integral part of a criminal statute, 8 U.S.C. §1326(b)(2), in addition to defining a removable offense. Accordingly, any ambiguity that the Court might find in the meaning of this dual purpose statute triggers the rule of lenity and not deference to the BIA, which has no role to play in interpreting criminal statutes. The criminal reentry provision, 8 U.S.C. §1326(b)(2) states that the maximum sentence for the federal crime of illegal reentry into the United

States after a prior deportation is increased from 2 years to 20 years for any alien "whose removal was subsequent to a conviction of an aggravated felony." Furthermore, the aggravated felony definition as both a ground of removal and a criminal penalty first entered the Act in the same legislation, Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4191 (Nov. 18, 1988). While the government seeks to downplay the definition of an aggravated felony as of "collateral relevance in a separate criminal prosecution," GBr. 49, the criminal implications are neither speculative nor "collateral." Many thousands of prosecutions for violation of 8 U.S.C. §1326 occur each year.[11] With this number of prosecutions, the definition of the term "aggravated felony"—a definition determining whether a defendant is subject to a sentence *ten times* greater than the usual maximum—has substantial recurring consequences in criminal law.

When a statute such as §1101(a)(43)(M) serves a dual criminal and civil purpose, the statute still must maintain a constant meaning. Giving the "same words a different meaning for each [context] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371 (2005). *See also United States v. Santos*, 128 S.Ct. 2020, 2030 (opinion of Scalia, Souter, Ginsburg, JJ) (lenity an important concern in dual use statutes that have criminal application). Thus, the meaning

[11] In fiscal year 2008, immigration cases accounted for 51% of all federal criminal cases. TRAC Reports, *www.http://trac.syr.edu/tracreports/crim/201/* (visited April 14, 2009). *See also* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 Hastings L. J. 137, 161-62n.125 (most commonly charged crime is illegal reentry, and in 2005, over 11,000 prosecutions occurred under 8 U.S.C. §1326).

accorded this statute in the civil context will also apply as part of criminal law and must therefore consistent with the principles for interpreting criminal statutes. *See, e.g., Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity in interpreting a criminal statute invoked in a civil action). "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Clark*, 543 U.S. at 380. Far from allowing "the tail to wag the dog," GBr. 49, this Court has mandated that in statutory interpretation, "[t]he lowest common denominator . . . must govern." *Clark*, 543 U.S. at 380.

The principle of statutory interpretation in light of the lowest common denominator prevents deference to the BIA's interpretation of this criminal statute. Agency deference occurs in two distinct steps: A court first determines if a statute is ambiguous using all the traditional tools of statutory construction, and then only if ambiguity exists, will a court defer to the implementing agency's construction of the statute if it is reasonable. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). However, when construing a criminal statute, the analysis cannot pass the first step because any statutory ambiguity mandates a construction favorable to the defendant under the rule of lenity, and not deference to the agency. *See, e.g., United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (applying the rule of lenity to a tax statute in a civil setting when the statutory construction had criminal applications).

This Court's prior cases mandate this conclusion. Thus this Court has twice interpreted the definition of "aggravated felony" in §1101(a)(43) without citing *Chevron* or so much as mentioning the possibility of deferring to the BIA's interpretation of its statute. *Lopez v. Gonzales*, 549 U.S. 47 (2006) (interpreting "illicit trafficking" as an aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (interpreting "crime of violence" as an aggravated felony). In *Leocal*, a civil deportation case, this Court addressed whether a state DUI conviction constituted an aggravated felony. The BIA had determined that a DUI was an aggravated felony because 8 U.S.C. §1101(a)(43)(F) stated that a "crime of violence" as defined in another definitional provision of code, 18 U.S.C. §16, constituted an aggravated felony, and the state DUI conviction at issue was a "crime of violence." A unanimous Court (Rehnquist, C.J.) held that such an offense was not an aggravated felony, relying in part on the rule of lenity: "Even if §16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with §16 in the deportation context, §16 is a criminal statute, and it has both criminal and noncriminal applications." *Leocal*, 543 U.S. at 11 n.8. The Court held that the §16 definitional section, a section not only analogous to §1101(a)(43) in purpose, but also incorporated into §1101(a)(43), must be interpreted in light of the rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Id.*

The government argues that it is of no consequence that this Court has twice, in *Leocal* and *Lopez*,

interpreted the aggravated felony definition without deferring to the BIA's interpretation because those "components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code." GBr. 48. However, this Court explained in *Leocal* that §16 simply provided "a general definition of the term 'crime of violence,'" *id.* at 381, much in the same way §1101(a)(43) provides a general definition of the term "aggravated felony." In essence, the government's argument reduces to the claim that this Court should treat two definitional sections differently in the same context simply because one is located in Title 8 and the other in Title 18 of United States Code. But simply placing a criminal provision outside Title 18 does not kill lenity. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (applying the rule of lenity because of concern regarding a criminal provision of Title 26, 26 U.S.C. §5871).

Indeed, the provision's location in the Act is of no practical consequence to a defendant who receives a twenty year sentence (ten times what he would otherwise) pursuant to the aggravated felony definition in Title 8. Furthermore, neither *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) nor the more recent decision in *Negusie v. Holder*, 129 S.Ct.1159 (2009) support the government's position because neither decision involved a part of the Act that was part of a federal criminal statute.

Attempting to evade the logic of this Court's two decisions interpreting the aggravated felony definition without deferring to the BIA's interpretation, the

government argues that this Court has deferred to agency interpretations of statutes that may be criminally enforced. Yet the two cases cited by the government, *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995) (interpreting regulation issued by the Secretary of the Interior under the Endangered Species Act) and *United States v. O'Hagan*, 521 U.S. 642 (1997) (prosecution for violation of an SEC Rule), involved vastly different statutory schemes. Under the statutory schemes in those two cases, Congress had explicitly provided for a criminal consequence for violating an agency regulation. *See* 16 U.S.C. 1540(b)(1) (providing criminal penalties for an individual who violates "any regulation issued in order to implement" the Endangered Species Act); 15 U.S.C. §78n(c) (defining specific types of securities violations and directing the SEC to "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative" which may include criminal penalties). Thus, in both instances, Congress explicitly delegated authority to the agency to develop regulations that could have criminal consequences, and these cases simply defer to the agency's construction of its own regulations. There is no such delegation here to draft regulations with criminal consequences, and ambiguities thus should not be resolved by *Chevron* deference but rather by the rule of lenity, as in *Leocal*.

The government also argues that deferring to the BIA's interpretation of the criminal provision "would obviate any potential for different constructions in the removal and criminal-sentencing contexts." GBr. 49. However, the government ignores the reality that applying the rule of lenity and holding that aggravated

felonies include only crimes where all necessary factors, such as the loss amount, are proven to the jury would reach that same result with more desirable consequences. That holding would necessarily mitigate any "*Apprendi* problem" because a jury would have previously found all necessary factors to impose a ten-fold sentencing increase. In that respect, application of the rule of lenity instead of deference to the BIA avoids an awkward and impractical consequence. The government concedes that if this Court defers to the BIA, the jury in the *later proceeding* must make a determination of the loss inherent in the *prior offense* beyond a reasonable doubt. GBr. 50. Thus, deference to the BIA shifts the burden of finding the loss amount from the jury that actually tried the first case to a jury that is trying a later, unrelated case. One of the original motivations of the application of the categorical approach was avoiding precisely this situation, where a later jury is forced in essence to retry a prior conviction. *See Taylor*, 495 U.S. at 600-01 (questioning whether allowing a sentencing court to examine facts underlying a conviction would pose problems such as allowing the defendant to produce a trial transcript or witnesses at the later sentencing).

Additionally, applying the rule of lenity instead of deferring to the BIA has the benefit of greater overall consistency in the application of the statute. If federal courts defer to the BIA's interpretation of the statute, criminal sentencing will depend on the BIA's current interpretation of the aggravated felony definition. *See generally Brand X*, 545 U.S. 967 (holding that agencies maintain the power to interpret their statutes even after a federal court's interpretation of statutory

ambiguity). The BIA's interpretation of the meaning of aggravated felony changes. *See, e.g., Leocal*, 543 U.S. at 5 n.2 (noting a changing BIA interpretation of aggravated felonies). Therefore, a defendant could face a higher sentence in one year than he would in another year for the same underlying conviction and the same underlying criminal conduct, due simply to a change in the BIA's position.

B. The Immigration Rule of Lenity Or Narrow Construction Should Apply and Preclude Chevron Deference.

Even if the criminal rule of lenity were held inapplicable, the rule of lenity or narrow construction for deportation provisions should apply and preclude *Chevron* deference. At the outset, of course, resort to *Chevron* deference is not appropriate because the plain language of §1101(a)(43)(M)(i) compels the conclusion urged by Petitioner. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Furthermore, *Chevron* itself requires resort to traditional rules of statutory construction. 467 U.S. 843 n9. *See also Cardoza-Fonseca*, 480 U.S. at 446; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 (traditional tools include textual canons). Indeed, as *McNary v. Haitian Refugee Ctr., Inc*, 498 U.S. 479, 496 (1991) holds "It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."

Among these traditional tools is the rule of lenity of narrow construction enunciated by *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948), which requires deportation

provisions to be narrowly construed so as to give the alien as much protection as possible. Grounded in harm to the alien from deportation,[12] this rule has provided a backdrop to all immigration legislation over the past 60 years and has never been supplanted by Congress. *See also INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. INS*, 376 U.S. 120, 128-29 (1964) (even if construction of deportation provision in doubt, court "would nevertheless be constrained by accepted principles of statutory construction in this area to resolve that doubt in favor the [alien]"). Accordingly, as a traditional canon of statutory construction, this rule should be applied at the step one stage of *Chevron* analysis. *See, e.g.*, John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 Geo. Immig. L.J. 605, 623 (2004) ("To the extent that the rule of lenity . . . is applicable to step one of the *Chevron* analysis, it would tend to serve as the tie-breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]"); *Matter of Small*, 23 I & N Dec. 448, 45 (BIA 2002)

[12] In seeking to downplay a recognition of this harm dating back to the founding era, GBr. at 46n.15, the government takes James Madison's remarks out of context, for he was actually protesting against deportation provisions allowing the President to remove an alien on suspicion without the safeguards attendant upon a criminal conviction. James Madison, *Writings* 623-624, "Report on the Alien and Sedition Acts," (Library of America 1999, Jack N. Rakove, ed.). Under the government's position, Mr. Nijhawan will be deported without having the conviction required for deportation.

(Rosenberg, J., dissenting) (rule should apply "even to interpretations of the plain language of the statute under the first prong of the test prescribed in *Chevron*"). Even if this rule were applied at the second stage, as suggested by dicta from the majority opinion in *Negusie*, 129 S.Ct. at 1174, albeit in a case not involving either a deportation provision or part of a federal criminal statute, the rule would still mandate that the Board's rule was unreasonable because not the most narrowly tailored interpretation of a deportation provision, a point underscored by *Dulal-Whiteway v. U.S. Dep't of Homeland Security*, 501 F.3d 116, 128 (2d Cir. 2007), which reached the exactly opposite result from *Matter of Babaisakov*[13] 24 I & N Dec. 306 (BIA 2007) in the Circuit where Mr. Nijhawan was convicted.[14]

Two additional factors counsel against deference. First, the actual Board decision here was non-precedential and thus merits no deference. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147,1158 (9th Cir. 2008) (collecting Court of Appeals cases holding no deference due non-precedential BIA decisions); *Matter of Yanez*, Int. Dec. 3473n.8 (BIA 2002) (en banc), *overruled on*

[13] Since *Babaisakov* formed no part of the decision below, the government's attempt to defeat certiorari by reliance upon that decision gave rise to Petitioner's argument about retroactivity. Moreover *Dulal-Whiteway* highlights the principal vice of retroactivity, for retroactive application of that decision would undermine controlling precedent where Petitioner was convicted.

[14] Certainly nothing in *Negusie* suggests that, as the government apparently urges, lenity should be addressed only after deference has been accorded.

other grounds, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (no reliance can be placed upon non-precedent BIA decisions).[15] Second, *Babaisakov*, 24 I & N Dec. at 306-07 itself involved a guilty plea by the alien in a removal proceeding where the government did not introduce either the plea agreement or plea transcript and did not concern a jury verdict. Thus, at the most elementary level *Babaisakov* is dicta as far as this case is concerned as is *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008), which involved only crimes involving moral turpitude.

C. The Government Misconstrues Sentencing

The government misapprehends what transpired at sentencing, well after the jury had returned a verdict, following no instruction to find any loss. Both the government and the District Court specifically recognized that the agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. PBr. 9—12. Since the

[15] In seeking to conjure up a parade of horribles, GBr. at 49n. 18, by intimating that acceptance of the Petitioner's position on deference would somehow threaten the BIA's construction of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A), the government fails to note that this presents a separate issue on a pending certiorari petition—one the government opposes—given the conflict among the Circuits on the meaning of 8 U.S.C. §1101(a)(43)(A), including whether Board precedent has actually construed this term in a manner that would merit *Chevron* deference. *See Canales-Matamoros v. Holder*, 2008 U.S. App. LEXIS 14721 (11th Cir. 2008) petition for cert. pending No. 08-643 (filed Nov. 11,2008).

requested instruction[16] was refused and the jury was never instructed to make any finding on loss, there was no occasion to argue that loss should be limited by the share allocated to a specific defendant, especially since the jury convicted without any verdict on loss, whether individually or jointly and severally. Given the absence of any charge on loss, much less a charge that such loss, once found, could be attributed to every member of the conspiracy, *Salinas v. United States*, 522 U.S. 52 (1997) is irrelevant, except for illustrating the minimal conduct required to bring a defendant within the web of a federal conspiracy prosecution.[17] In the final analysis the sentencing proceedings are red herring. The statute requires conviction, the jury was not instructed to find loss, and Mr. Nijhawan was thus not convicted of loss.

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[16] The government does not dispute either the authenticity of the District Court record or that such a record is properly subject to judicial notice, while even the BIA's own regulations permit judicial notice of the contents of official documents as part of the administrative record. 8 C.F.R. §1003.1(d)(3)(iv).

[17] To the extent that the government seeks to inflate Mr. Nijhawan's role, its does so not by reference to the facts the jury was charged to find but rather the Presentence Investigation Report. GBr. 5.

CONCLUSION

The plain language of the statute requires that an alien be convicted of the required loss under the categorical approach. That did not happen here. Even if the plain language is considered ambiguous, the ambiguity should be resolved in the Petitioner's favor under the rule of lenity applicable either to a federal criminal statute or a deportation provision. Accordingly, the decision below should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

Attorneys for Petitioner

AMICUS CURIAE BRIEF

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Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN LAW CAUCUS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND NORTHWEST IMMIGRANT RIGHTS PROJECT IN SUPPORT OF PETITIONER

CECILLIA D. WANG
LUCAS GUTTENTAG
CAROLINE P. CINCOTTA
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

JAYASHRI SRIKANTIAH
Counsel of Record
IMMIGRANTS' RIGHTS CLINIC
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

ALINA DAS
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6430

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are immigration organizations with expertise on the application of the categorical rule in immigration proceedings. *Amici* have represented or counseled innumerable non-citizens in removal cases before the Board of Immigration Appeals and the federal courts, and in other immigration proceedings. We are concerned that the government's proposal to depart from the categorical rule in immigration proceedings is contrary to statute and would result in immigration adjudicators considering unreliable evidence to determine the immigration consequences of crimes, with unfair and non-uniform results.

Amici consist of the following organizations: the American Civil Liberties Union, American Immigration Lawyers Association, Asian Law Caucus, Florence Immigrant and Refugee Rights Project, Florida Immigrant Advocacy Center, Immigrant Defense Project, National Immigration Law Center, National Immigration Project of the National Lawyers Guild and Northwest Immigrant Rights Project. More

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[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici* have filed the letters of consent with the Clerk of the Court.

detailed descriptions of *amici* are included in the appendix to this brief.

SUMMARY OF ARGUMENT

The government's proposal that immigration judges engage in open-ended fact-finding to determine the loss amount associated with a prior fraud conviction would mark an abandonment of the categorical approach set forth by the Court in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and applied to the immigration aggravated felony context in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). The categorical approach, which has a 100-year history in immigration law, requires immigration courts to look only to the elements set forth in the statutory definition of a predicate criminal conviction to determine its immigration consequences. The approach accords with the language of 8 U.S.C. § 1227(a)(2)(A)(iii), which hinges immigration consequences on a non-citizen's prior conviction, and not merely conduct. In this case, the aggravated felony provision at issue, 8 U.S.C. § 1101(a)(43)(M)(i), contains two requirements: (1) that the prior offense involves fraud or deceit; and (2) that the loss to the victim exceeds $10,000. As more fully explained in Petitioner's brief, when the statute of conviction lacks one of these two requirements—namely the requirement that the conviction entailed a loss exceeding $10,000—a categorical match is impossible. *See* Pet. Br. at 42-44.

Even if the Court concludes that immigration court review is not limited to comparison of the statute of conviction against the components of the aggravated felony definition, the Court should reject the government's proposal for open-ended fact-finding in immigration court. As the Second Circuit explained in *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007), in going beyond a strict element-based approach, *Taylor* and *Shepard* limit immigration court review to certain reliable documents. In the case of a conviction by jury, a subsequent court may review the indictment and jury instructions. *Taylor*, 495 U.S. at 602. When a defendant pled guilty, the subsequent court may consider "the statement of factual basis for the charge, . . . shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 544 U.S. at 20.

The government's suggestion that immigration courts may expand their review beyond the limited set of criminal record documents described in *Taylor* and *Shepard*, *see Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007), raises serious reliability concerns. Those problems are exemplified by the decision below, which approved use of a sentencing stipulation, notes on a judgment of conviction, and a restitution order to prove the loss amount, *Nijhawan v. Mukasey*, 523 F.3d 387, 389 (3d Cir. 2008), when in

fact these records do not reliably show the actual loss amount at all.

Reliance on documents outside those contemplated by *Taylor* and *Shepard* also raises fairness concerns. Nothing in the Immigration and Nationality Act (INA) or the long history of deportation proceedings remotely suggests that immigration judges should conduct mini-trials to determine the amount of loss based on unreliable criminal documents. Such mini-trials would not only be inconsistent with *Taylor* and *Shepard*, but also would be troubling given the lack of evidentiary and procedural protections in immigration courts and in non-adversarial contexts where immigration officers apply the aggravated felony definition. The government's proposal would also result in non-uniform decisions, since immigration courts would rely on criminal records whose contents vary from one criminal jurisdiction to another. In short, abandoning the categorical approach—and particularly construing the statute to permit open-ended fact-finding—would result in a high likelihood that individuals will be removed from the United States when they have not been convicted of the acts that Congress has deemed to be serious enough to warrant deportation.

ARGUMENT

This case turns on the interpretation and application of two immigration statutes. The first, 8 U.S.C. § 1227(a)(2)(A)(iii), provides that "[a]ny alien who is

convicted of an aggravated felony at any time after admission is deportable." The second, 8 U.S.C. § 1101(a)(43)(M)(i), is one of the numerous definitions of "aggravated felony" codified at 8 U.S.C. § 1101(a)(43), and it is the one under which the petitioner, Manoj Nijhawan, was found deportable. Section 1101(a)(43)(M)(i) contains two components, defining the aggravated felony as "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ." Although this Court granted *certiorari* on the relatively narrow question of whether the Third Circuit properly held that the requisite loss amount could be proved by three specific documents from the underlying criminal matter, this case presents a broader question about how immigration adjudicators should determine whether the loss amount requirement of § 1101(a)(43)(M)(i) is satisfied.

Until recently, the Board of Immigration Appeals (BIA) and the federal courts of appeals uniformly applied the "categorical rule" from *Taylor* and *Shepard* to determine whether a non-citizen's prior criminal conviction meets a generic aggravated felony definition under 8 U.S.C. § 1101(a)(43). In *Taylor* and *Shepard*, the Court considered the proper method for courts to determine when a criminal defendant's prior conviction triggers the recidivism-based sentencing enhancement provision in the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The Court held that courts are required to apply "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts

underlying those convictions." *Taylor*, 495 U.S. at 600. This Court has used the *Taylor/Shepard* categorical approach for determining whether a non-citizen's prior criminal conviction falls within a statutory ground for deportability. *See Duenas-Alvarez*, 549 U.S. at 185-87; *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004).

Taylor and *Shepard* recognize an exception to the categorical rule, but it is not the open-ended exception the government advocates here, and it does not invite the factual re-litigation that the government now seeks in subsequent immigration proceedings. The *Taylor* Court held that "in a narrow range of cases" where the statute alone does not reveal whether the defendant's prior conviction matches the generic definition triggering the penalty, the sentencing court should look to the indictment and jury instructions to determine whether the "jury was actually required to find all the elements" of the generic offense. *Taylor*, 495 U.S. at 602. When the conviction was not by jury verdict, the court may look only to

> the closest analogs to jury instructions . . . a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases . . . the statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.

Shepard, 544 U.S. at 20. The courts of appeals have dubbed this limited inquiry beyond the face of the statute the "modified categorical approach." *Duenas-Alvarez*, 549 U.S. at 187.[2]

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[2] The Court's recent decision in *United States v. Hayes*, No. 07-608, ___ U.S. ___, 2009 WL 436680 (Feb. 24, 2009), does not affect the issue here. *Hayes* concerned 18 U.S.C. § 922(g)(9), which provides that it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. The Court held that "the domestic relationship, although *it must be established beyond a reasonable doubt* in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." *Id.* at *3 (emphasis added). *Hayes* so held because the predicate offense was an element of a criminal statute; regardless of whether a jury had to find the domestic relationship element beyond a reasonable doubt in the prior misdemeanor case, the jury in the *new* § 922(g)(9) case was required to find the domestic relationship beyond a reasonable doubt. *See United States v. White*, 328 F.3d 1361, 1367 n.2 (Fed. Cir. 2003) ("this holding [that the categorical approach does not apply] in no way relieves a prosecutor's burden to prove to the jury beyond a reasonable doubt that a criminal defendant had a domestic relationship . . . in order to win a conviction under § 922(g)(9)"). The procedural protection of a second jury is present neither in the *Taylor/Shepard* context of a recidivism-based sentencing enhancement nor in the instant immigration context. Indeed, the majority opinion in *Hayes* did not mention *Taylor* and *Shepard* at all, and the *Hayes* rule does not affect the continued force of *Taylor* and *Shepard* in the sentencing and deportation contexts.

In addition, *Hayes* rests upon statutory language that is not present in the statutes at issue here. For example, the statute defining "misdemeanor crime of domestic violence," 18 § 921(a)(33)(A), defines the offense as one that "has as *an element* the use . . . of physical force . . . committed by a current or former spouse . . . ." (emphasis added). *Hayes* focused on

(Continued on following page)

Instead of adhering to the requirements of *Taylor* and *Shepard*, the Third Circuit and BIA have approved broad, open-ended fact-finding by immigration courts to determine the amount of loss in the prior criminal case. *See Babaisakov*, 24 I. & N. Dec. at 313-16, 318; *Nijhawan*, 523 F.3d at 393-94.[3] The BIA has gone so far as to hold explicitly that "an Immigration Judge may consider *any* evidence, otherwise admissible in removal proceedings, including witness testimony." *Babaisakov*, 24 I. & N. Dec. at 321 (emphasis added).

Amici submit that the open-ended fact-finding approach taken by the Third Circuit and the BIA incorrectly abandons the established categorical approach that must apply based on the plain words of the statute at issue. *See infra* Part I.A. For the reasons set forth in Petitioner's brief at 42-44, the most faithful application of the categorical rule is the

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Congress's use of the singular noun "element" to conclude that only the first requirement (use of physical force) must be an element of the predicate offense, while the second requirement (the domestic relationship) need not be. *Hayes*, 2009 WL 436680, at *4.

[3] *See also Conteh v. Gonzales*, 461 F.3d 45, 61-62 (1st Cir. 2006) (engaging in a similar analysis and permitting consideration of a restitution order to determine amount of loss); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008) (holding that any "reasonable, substantial, and probative" evidence, including pre-sentence report, can be examined to determine amount of loss); *Ali v. Mukasey*, 521 F.3d 737, 741-43 (7th Cir. 2008) (adopting *Babaisakov* approach to determine inadmissibility under 8 U.S.C. § 1182(a)(2)(A)).

analysis of the Ninth Circuit in *Kawashima v. Mukasey*, which followed Judge Kozinski's earlier guidance to hold that the loss requirement in § 1101(a)(43)(M)(i) must be an element of the underlying statute of conviction for a prior fraud conviction to constitute an aggravated felony. 530 F.3d 1111, 1117-18 (9th Cir. 2008) (per curiam) (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc)), *pet. for reh'g en banc filed* Sept. 15, 2008. *See also Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring) (noting that *Taylor* plainly forbids resort to review of conviction documents when loss amount is not an element of the statute of conviction).

If the Court permits any deviation from a pure element-based test in this case, the Court should adopt the reasoning of the Second Circuit in *Dulal-Whiteway* to limit the immigration courts' inquiry to reliable documents from the record of conviction as set forth in *Taylor* and *Shepard*. The Second Circuit has observed that the "modified categorical approach" from *Taylor* and *Shepard* has been applied in two circumstances. First, the modified categorical approach has been applied when the statute of conviction contains "alternative means of committing a violation, some of which constitute removable conduct and some of which do not, . . . as discrete alternatives." *Id.* at 127. In such cases, an immigration court may consult the record of conviction only for the limited purpose of determining under which of the "discrete alternatives" the petitioner was convicted.

Second, the modified categorical approach has been applied to statutes, such as the ones under which the petitioner in *Dulal-Whiteway* and Mr. Nijhawan were convicted, that "delineat[e] a single crime that can be committed both by removable and non-removable conduct." *Id.* at 128. Under either version of the modified categorical approach, the immigration court's inquiry is still limited to the documents approved in *Taylor* and *Shepard*.[4] Applying the second version of the modified categorical approach, *Dulal-Whiteway* concluded that restitution orders are not among those documents approved in *Taylor* and *Shepard* as they do not constitute reliable proof of the nature of the criminal conviction. *Id.* at 129-30.[5]

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[4] Two hypothetical statutes can help to illustrate the difference between the two versions of the modified categorical approach. If a state fraud statute punished obtaining property by fraud where either the amount of loss exceeds $10,000 or the victim is over 65 years old, an immigration court would apply the first type of modified categorical approach and examine the record of conviction to decide whether the jury found, or the defendant pled to, the loss element. By contrast, if a state fraud statute punished fraud with a loss exceeding $5,000, or had no loss element at all, an immigration court could apply the second type of modified categorical approach to determine whether the convicting jury found, or the defendant admitted to in his plea allocution or plea agreement, a loss in excess of $10,000.

[5] *See also Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007) (applying *Dulal-Whiteway* version of the modified categorical approach to reject the BIA's reliance on restitution order); *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008) (following *Dulal-Whiteway* approach in different aggravated felony context).

In either application of the modified categorical approach, the universe of reliable documents is limited, as set forth in *Taylor* and *Shepard*, to those that demonstrate that a jury found, or the defendant admitted to, the required fact in connection with the conviction. *Amici* submit that if the Court declines to adopt the pure element-based approach of the Ninth Circuit in *Kawashima*, the Court should expressly hold that the proof of loss amount under 8 U.S.C. § 1101(a)(43)(M)(i) must be limited to the documents approved by *Taylor* and *Shepard*, as the Second Circuit held in applying the modified categorical approach in *Dulal-Whiteway*.

As explained more fully below, the open-ended fact-finding approach of the Third Circuit and the BIA contravenes the statutory language of 8 U.S.C. §§ 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii), ignores the reliability concerns underlying *Taylor* and *Shepard*, and is fundamentally incompatible with the deportation system established by Congress and consistently implemented by immigration adjudicators.

I. Consistent with *Taylor* and *Shepard*, the INA Requires an Immigration Judge to Find the Existence of an Aggravated Felony Conviction Based on Reliable Evidence that the Requisite Elements were Admitted by the Defendant in Pleading Guilty or Found Beyond a Reasonable Doubt.

A. Sections 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii) Premise Aggravated Felony Penalties on the Existence of a Prior Conviction.

The BIA and Third Circuit's open-ended fact-finding approach is inconsistent with the plain language of the INA, which premises aggravated felony consequences on the existence of a prior conviction, and not merely prior conduct. In combination, the statutes governing Mr. Nijhawan's removal provide that an alien who "is convicted of" (8 U.S.C. § 1227(a)(2)(A)(iii)) "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(i)) is deportable. The plain and ordinary meaning of this language is that the alien must have been "convicted of" both elements of § 1101(a)(43)(M)(i) to be deportable.

That this was Congress's intent is clear from a comparison of § 1227(a)(2)(A)(iii) with other statutes that hinge deportability not on a prior conviction, but in significant contrast, on simply the commission of some act. The INA contains numerous examples

where mere criminal *conduct* without a conviction constitutes a basis for deportation.[6] When Congress wanted immigration judges to engage in open-ended fact-finding divorced from the requirements of the categorical rule, it knew how to enact such provisions. In contrast, in enacting § 1101(a)(43)(M), Congress chose to base deportability upon a prior criminal *conviction*, and it is to the prior criminal conviction that the immigration judge must look in determining whether the aggravated felony definition applies.

Both the Third Circuit and the BIA have held that the words "in which" in 8 U.S.C. § 1101(a)(43)(M)(i) somehow divorce the loss component of the aggravated felony definition from the fraud component and subject the two components to drastically different treatment. Based on the two words "in which," the Third Circuit concluded that the determination of loss amount need not be tied to the conviction, but is a "qualifying" "fact" that the immigration court need only find to be sufficiently "tethered" to the conviction. *Nijhawan*, 523 F.3d at 394-96. Similarly, based

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[6] *See, e.g.*, 8 U.S.C. §§ 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."), 1227(a)(3)(D) ("Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter . . . or any Federal or State law is deportable."), 1227(a)(4)(A)(i) ("Any alien who has engaged, is engaged, or at any time after admission engages in . . . any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information . . . is deportable.").

on the thin reed of the "in which" phrase, the BIA created a distinction between "offense-element" facts and "nonelement" facts, and then imposed entirely different approaches to ascertaining the two ostensible types of facts. The Third Circuit and the BIA have pulled the concepts of "tethering," "qualifying fact," "offense-element fact," and "nonelement fact" out of thin air—these terms appear nowhere in the statute or legislative history of the aggravated felony provision.

The Ninth Circuit correctly understood the language of § 1101(a)(43)(M)(i) in adopting the pure elements-based categorical approach for both the fraud and loss components in *Kawashima*. But even if the Court finds that approach inapplicable, there is still no basis for opening the loss determination to full re-litigation in the evidentiary free-for-all that the government proposes. Instead, the Court should adopt the Second Circuit's *Dulal-Whiteway* approach and limit the scope of inquiry on loss amount to the reliable documents specified in *Taylor* and *Shepard*.

B. The Third Circuit and BIA Rulings Ignore the Reliability Concerns Underlying *Taylor* and *Shepard*.

The documents approved in *Taylor* and *Shepard* have one thing in common: they constitute reliable proof of the actual facts established in the prior criminal case. When the conviction is by guilty plea, the documents must establish that the defendant

admitted the facts underlying the conviction in the course of a guilty plea. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."); *United States v. O'Donnell*, 539 F.2d 1233, 1236 (9th Cir. 1976) ("pleas of guilty, when made voluntarily and intelligently, are admissions of factual guilt which are so reliable, that the issue of factual guilt is removed from the case") (superseded on other grounds by amendment to Fed. R. Crim. P. 11). When the conviction occurs after a trial, the documents must establish that the jury (or in cases where there is a bench trial, the judge) found the existence of the facts underlying the conviction beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 364 (1970).[7] This Court has cautioned that other

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[7] In rejecting the *Taylor/Shepard* approach, the Third Circuit posed the hypothetical question, "why the prosecutor would ever ask the jury to find a fact not relevant to the conviction." *Nijhawan*, 523 F.3d at 399 n.11. Apparently, the Third Circuit believed that there was no good answer to that question. But this Court's precedents provide one: prosecutors are *required* to ask a jury to find a fact not relevant to the conviction—*i.e.*, a fact that is not an element of the offense—when that fact is the basis for an increased maximum sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004). *See also United States v. Booker*, 543 U.S. 220, 231 (2005) (noting that a statute's "characterization of critical facts [as an element of the offense or not] is constitutionally irrelevant" to whether a jury must find them) (citations omitted).

documents from the criminal record—such as police reports or criminal complaint applications that merely set forth unproved allegations—do *not* constitute reliable proof of what actually transpired in the past offense. *Shepard*, 544 U.S. at 16.

The decision below demonstrates precisely why deviation from *Taylor* and *Shepard* leads to unreliable results. The Third Circuit held that the $10,000 loss requirement was met because (1) Mr. Nijhawan "entered into a stipulation for sentencing purposes in which he agreed that, 'because the loss from the offense exceeds $100 million, the offense level [under the U.S. Sentencing Guidelines] is increased 26 levels'"; (2) in entering the judgment of conviction, the trial judge filled in the space for "loss" with the amount $683,632,800.23 along with a notation that the finding of loss was required under the federal criminal code; and (3) Mr. Nijhawan was ordered to pay restitution in the amount of $683,632,800.23. *Nijhawan*, 523 F.3d at 389. None of those documents suffices under *Taylor* and *Shepard*; they do not reliably prove actual loss to the victim.

A "stipulation for sentencing purposes"—unlike an admission made in the course of pleading guilty—does not necessarily reflect the actual facts of the case. Rather, a defendant may acquiesce to a certain loss amount for purposes of obtaining an agreed-upon sentencing range, or for purposes of setting the restitution amount, even if he could not state truthfully under oath that the negotiated loss amount reflects what actually transpired in the course of

committing the offense. The defendant may agree to the government's alleged loss amount because the overall *quid pro quo*, taking all factors into account, is favorable.[8]

The other documents the Third Circuit relied upon—the sentencing court's judgment of conviction and restitution order—are also unreliable evidence of what actually happened in Mr. Nijhawan's past conviction. In setting restitution and making findings for sentencing purposes, a federal district court applies a preponderance of the evidence standard. *See, e.g., United States v. Juwa*, 508 F.3d 694, 701 (2d Cir. 2007); *United States v. Ali*, 508 F.3d 136, 143 (3d Cir. 2007). Moreover, in making factual findings for sentencing purposes, a federal district court may rely upon hearsay evidence—and even credit it over sworn testimony. *See* U.S.S.G. § 6A1.3.[9] Indeed, under the

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[8] For example, in a fraud case involving numerous transactions, the government may contend that the loss amount for the entire scheme is $25,000, while the defendant honestly contends that some of the transactions were actually legitimate and thus the loss amount is only $5,000. In the course of plea negotiations, the defendant may acquiesce in a compromise loss amount of $15,000, even though he does not agree that some of the included transactions were in fact fraudulent. The defendant may decide that the bargain is worthwhile (*e.g.*, if the government is forgoing other charges), even though the factual assumptions are not accurate, particularly if he fears he will not prevail in a contest over the loss amount in light of the low preponderance of the evidence standard that applies to fact-finding at sentencing.

[9] State restitution orders also permit findings of amount of loss to be based on hearsay evidence, and the amount of loss

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federal sentencing guidelines, the court may hold a defendant accountable for "relevant conduct" including losses associated with counts on which the defendant was not convicted. *See* U.S.S.G. § 1B1.4. Similarly, "judgments of conviction" contain unreliable and unproven factual allegations. *See, e.g.*, N.J. R. 3:21-5(b) (judgment of conviction shall contain a "statement of the reasons" for the sentence imposed); *Bibby v. Tard*, 741 F.2d 26, 30-31 (3d Cir. 1984) (in judgment of conviction, trial court erroneously stated that defendant had an armed robbery conviction and that defendant carried a loaded weapon, a fact the state conceded was false).

Thus, under federal sentencing laws, the sentencing court's determination of loss amount as reflected in the judgment of conviction and restitution is far less reliable than the documents this Court held to be permissible in *Taylor* and *Shepard*, and that the Second Circuit accepted as reliable in *Dulal-Whiteway*. *Cf. Blakely*, 542 U.S. 296 at 311-12 (noting unfairness that would result if defendant could be

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similarly need only be shown by a preponderance of the evidence or some lesser standard. *See, e.g., People v. Francis L.M.*, 718 N.Y.S.2d 669 (N.Y. App. Div. 2000) (court was entitled to rely upon hearsay); *Commonwealth v. Casanova*, 843 N.E.2d 699, 755-56 (Mass. App. Ct. 2006) (same); *People v. Tabb*, 88 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2009) ("standard of proof at a restitution hearing is by a preponderance of the evidence"); *State v. Gears*, 733 N.E.2d 683, 686 (Ohio Ct. App. 1999) ("amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty").

subjected to large increase in maximum potential sentence "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a [presentence] report compiled by a probation officer who the judge thinks more likely got it right than got it wrong").[10]

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[10] The Third Circuit opined that applying the modified categorical approach to loss amount would improperly import the beyond-a-reasonable-doubt standard of proof from the criminal case into the immigration context, where a clear-and-convincing standard applies pursuant to 8 U.S.C. § 1229a(c)(3)(A). *Nijhawan*, 523 F.3d at 398. But this confuses the general standard of proof for questions relating to removal with the specific requirement that Congress imposed by basing this particular ground for deportability upon a prior criminal conviction. When Congress has premised deportability upon a *conviction*, as under 8 U.S.C. § 1227(a)(2)(A)(iii), there necessarily must have been a finding beyond a reasonable doubt in the underlying criminal conviction. Indeed, in holding that the categorical approach does apply to the fraud component of the aggravated felony definition, the Third Circuit acknowledges that the fraud element must have been proved beyond a reasonable doubt in the prior criminal proceeding, even though the general standard for removal proceedings is clear and convincing evidence.

There is nothing illogical about the *Dulal-Whiteway* approach because, under that approach, immigration courts rely upon documents showing that the loss component was proved beyond a reasonable doubt in the prior criminal case. That evidence necessarily meets the lower clear-and-convincing evidence standard of 8 U.S.C. § 1229a(c)(3)(A). In contrast, under the Third Circuit's approach, a fact established during sentencing, and thus only by a preponderance of the evidence, would illogically be deemed sufficient to prove the loss amount by the *higher* standard of clear and convincing evidence.

The likelihood of arbitrary or erroneous decisions based on unreliable documents becomes even greater if immigration judges look to state court documents beyond restitution orders, such as presentence reports. The range of information that may be included in such reports is exceedingly broad, *see, e.g.*, Cal. R. Ct. 4.411.5 (report should include "[a]ny statement made by the defendant to the probation officer," the victim's statement, "[a]ny relevant facts concerning the defendant's social history," and statements from police, prosecutors, probation officers, and any other "interested persons"); N.Y. Crim. Law § 390.30(1) (presentence reports contain "circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, ... [and] any other matter which the agency conducting the investigation deems relevant"). In some jurisdictions, information is included in a presentence report merely because the investigator deems it "relevant" or "reliable." *See, e.g., id.* § 390.30(3)(a); Idaho Crim. R. 32(e).

In short, because the BIA and Third Circuit's approach permits the use of entirely unreliable evidence as to loss amount, there is a great likelihood that non-citizens will be held deportable under 8 U.S.C. § 1101(a)(43)(M)(i) when in fact they have not been convicted of the conduct that Congress has deemed serious enough to warrant removal.

C. The Court Should Not Defer to the BIA's Interpretation of the Statutory Language.

The Court should reject the government's argument that deference to the BIA compels the BIA's open-ended fact-finding approach. No deference to the agency is permitted because the statutory language unambiguously requires a "convict[ion]" for an aggravated felony, and does not permit recourse to non-conviction documents to determine the loss amount. 8 U.S.C. § 1227(a)(2)(A)(iii). *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (deference only applies when statute is ambiguous).

Even if the statute were ambiguous, the BIA's decision is not entitled to deference because 8 U.S.C. § 1101(a)(43)(M) is a criminal statute as well as an immigration statute. In addition to supplying the definition of "aggravated felony" for purposes of the deportability statute, 8 U.S.C. § 1227(a)(2)(A)(iii), § 1101(a)(43)(M) also operates as a criminal statute through 8 U.S.C. § 1326(b)(2), which states that the maximum sentence for the federal crime of illegal reentry into the United States after a prior deportation is increased from 2 years to 20 years for any non-citizen "whose removal was subsequent to a conviction for commission of an aggravated felony." It is well-settled that the BIA has no authority to interpret federal criminal statutes. *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382, 385 (BIA 2007). *See generally Gonzales v. Oregon*, 546 U.S. 243, 258

(2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress delegated to the official.").

And finally, even if deference to the BIA's view might otherwise be considered, the government's interpretation should be rejected under the rule of lenity. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court applied the rule of lenity in an analogous circumstance, construing a criminal statute, 18 U.S.C. § 16, which defines "crime of violence" through cross-reference to an immigration statute, 8 U.S.C. § 1101(a)(43)(F). *Id.* at 11 n.8 ("Although we deal here with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and non-criminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). *Cf. United States v. Hayes*, No. 07-608, ___ U.S. ___, 2009 WL 436680, at *13 (Feb. 24, 2009) (Roberts, C.J., and Scalia, J., dissenting) ("textbook case for application of the rule of lenity" exists when "text of [statute] is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much").

II. Immigration Courts Have Limited Their Review to Reliable Conviction Record Documents Through Application of a Categorical Approach for Over a Century.

Even prior to the Supreme Court's decisions in *Taylor* and *Shepard*, immigration courts had been applying a categorical approach (in either its pure element-based or modified forms) to determine the immigration consequences of predicate criminal convictions for more than a century. With prior immigration provisions that premised immigration consequences on the existence of a prior conviction—like the aggravated felony provisions at issue here—immigration adjudicators applied a categorical approach that ensured reliance on only the most reliable criminal court documents. Congress legislated against this history when it created the aggravated felony provisions of the current statute, which also predicate immigration consequences on prior conviction (and not commission) of offenses. *See Hayes*, 2009 WL 436680, at *6 (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006), for proposition that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (internal quotation marks omitted); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

A categorical approach that does not permit open-ended fact-finding has a long history in immigration

law, stemming from Congress's continuous use of "convicted" language in the immigration statute since at least 1891. *See* Act of March 3, 1891, 26 Stat. 1084. In a 1914 case, the Second Circuit Court of Appeals issued a landmark decision explaining this approach to assessing an individual's conviction under the Act:

> [T]he immigration officers . . . do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.

United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914). This reasoning was further refined by Judge Learned Hand in a series of decisions in the 1930s. *See, e.g., United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931). Other federal courts and the immigration agency agreed with this interpretation of the statute in dozens of decisions over the next several decades.[11]

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[11] *See, e.g., Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975); *United States ex rel. Giglio v. Neelly*, 208 F.2d 337, 342 (7th Cir. 1953); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546, 548 (5th Cir. 1952); *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929); *Matter of B-*, 1 I. & N. Dec. 52, 57-58 (AG 1941); *Op. of Hon. Cummings*, 39 Op. Att'y Gen. 215 (AG 1938); *Op. of Hon. Cummings*, 39 Op. Att'y Gen. 95 (AG 1937); *Op. of Hon. Cummings*, 37 Op. Att'y Gen. 293 (AG 1933); *Matter of V-D-B-*, 8 I. & N. Dec. 608, 610 (BIA 1960); *Matter of F-*, 8 I. & N. Dec. 469, 472 (BIA 1959); *Matter of H-*, 7 I. & N. Dec. 616, 618 (BIA 1957); *Matter of B-*, 5 I. & N. Dec. 538, 540 (BIA 1953); *Matter of R-*, 4 I.

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These early cases demonstrate the BIA's longstanding concern that deportability determinations be based only on reliable evidence of the prior conviction, such as the plea and indictment. *See, e.g., Matter of B-*, 5 I. & N. Dec. 538, 540 (BIA 1953); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946); *Matter of B-*, 1 I. & N. Dec. 52, 57-58 (AG 1941).

The government's proposal to allow immigration courts to consider unreliable evidence of prior convictions runs contrary to this long immigration history, a history of which Congress presumably was aware when it enacted the aggravated felony provision at issue in this case. Indeed, nothing in the statute or its legislative history reflects a desire by Congress to have immigration judges abandon a categorical approach.[12]

& N. Dec. 176, 179 (BIA 1950); *Matter of T-*, 3 I. & N. Dec. 641, 642-43 (BIA 1949); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946); *Matter of W-*, 1 I. & N. Dec. 485, 485-86 (BIA 1943).

[12] Congress has amended the aggravated felony provisions at least four times without changing the requirement that the non-citizen be convicted of the predicate offense. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-627 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-22 (1994); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990). In fact, Congress has considered and rejected deviation from the categorical approach. *See* Border Enforcement, Employment Verification, and Illegal Immigration Control Act, 110th Congress, 1st

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To the contrary, in its most recent comprehensive revision of the immigration statute in 1996, which included an amendment to the aggravated felony provision at issue here, Congress indicated its intent that removal proceedings be conducted in the same manner that they had been previously. *See* H.R. Rep. No. 104-828, at 211 (1996) (Conf. Rep.) ("the removal proceeding under [the new] section[s] shall be conducted by an immigration judge in largely the same manner as [already] provided in sections [governing deportation proceedings]").

III. Under the Third Circuit and BIA's Approach, Immigration Adjudicators Would Be Required to Conduct Mini-trials as to Amount of Loss, with Unfair and Non-Uniform Results.

Under the government's position, immigration courts would be faced with many of the practical and fairness problems that the Court took pains to avoid in *Taylor* and *Shepard*, and that the Second Circuit recognized in *Dulal-Whiteway*. *Cf. Hayes*, 2009 WL 436680, at *13 (Roberts, C.J., and Scalia, J.,

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Session, H.R. 4065 (2007) (proposing failed amendment to INA defining aggravated felonies as offenses "described in [the INA] even if the statute setting forth the offense of conviction sets forth other offenses not described in this paragraph, unless the alien affirmatively shows . . . that the particular facts underlying the offense do not satisfy the generic definition of that offense").

dissenting) ("As we warned in *Taylor* and reaffirmed in *Shepard*, 'the practical difficulties and potential unfairness of a factual approach are daunting.'") (citations omitted). These include the inability of criminal records to adequately convey what a jury was actually required to find, variations among cases and records, and the inability of defendants to rely on issues already adjudicated during the trial. *See Taylor*, 495 U.S. at 601-02. Consideration of such fairness concerns is consistent with Due Process protections that govern removal proceedings. *See generally Landon v. Plasencia*, 459 U.S. 21 (1982).

A. Mini-trials as to Amount of Loss are Inconsistent with the Limited Evidentiary and Procedural Protections Available in Removal Proceedings.

This Court's concerns about the procedural unfairness inherent in a factual inquiry, as expressed in *Taylor* and *Shepard*, apply with even greater force in the immigration courts. These administrative tribunals are ill-suited to conduct the fact-intensive inquiries envisioned by the government because of the structure of removal proceedings, which are not governed by formal rules of evidence and lack basic procedural protections.

Immigration courts are not governed by formal rules of evidence. The courts of appeals have upheld, for example, the admission of poorly authenticated and hearsay evidence. *See, e.g., Duad v. Holder*, ___ F.3d

___, 2009 WL 331289, at *3-4 (7th Cir. Feb. 12, 2009); *Solis v. Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008); *Vatyan v. Mukasey*, 508 F.3d 1179, 1185 (9th Cir. 2007); *Yongo v. INS*, 355 F.3d 27, 30-31 (1st Cir. 2004). In the mini-trials required by the government's approach, this lax evidentiary standard could lead to unfair results. If, as envisioned by the government's position, a non-citizen who pleads guilty to a fraud offense faced a subsequent mini-trial as to the amount of loss, an immigration judge could reach conclusions inconsistent with the original criminal proceeding, based on the application of less rigorous evidentiary standards.

The mini-trials created by the government's approach would result in further unfairness because most constitutional and procedural protections present in the criminal context do not apply with full force in removal proceedings. Non-citizens have neither appointed counsel, *see* 8 U.S.C. § 1229a(b)(4)(A), nor a right to a jury trial. The Fourth Amendment exclusionary rule and Fifth Amendment privilege against self-incrimination also do not apply with full force. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (exclusionary rule does not apply unless egregious violation). *Cf. United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) (permitting adverse inference from non-citizen's silence).

Although the INA permits limited discovery and subpoenas in immigration court, 8 U.S.C. § 1229a(b)(1), immigration judges typically grant very little discovery and rarely exercise subpoena power.

See C. Gordon et al., *Immigration Law & Procedure* § 3.07 (2008) (noting "traditional reluctance to permit discovery"). Indeed, most non-citizens are able to obtain basic information, namely the government's file about them, only by resorting to requests under the Freedom of Information Act, which usually entail significant delays. *See* 8 C.F.R. § 103.10; Department of Homeland Security, 2008 Annual Freedom of Information Act Report to the Attorney General of the United States 12, 20 (2008), *available at* http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf (median of 238 days for USCIS processing of perfected FOIA requests; 67,545 backlogged FOIA requests for fiscal year 2008). Non-citizens do not have a right to obtain exculpatory evidence in their removal proceedings, including evidence as to amount of loss (if that determination is to be made, as the government suggests, as part of a factual determination). And the Court has observed that "[t]he Courts of Appeals have held . . . that the absence of Miranda warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation case." *Lopez-Mendoza*, 468 U.S. at 1039.

Given the procedural and evidentiary limitations of removal proceedings, the government's proposal that immigration judges conduct factual inquiries to determine the amount of loss would lead to unfair adjudications.

B. Mini-trials as to Amount of Loss are Particularly Impracticable and Unfair Given the Realities of Current Removal Proceedings.

In addition to the structural deficiencies of immigration courts, immigration judges are often required to make aggravated felony determinations based on old convictions where evidence as to loss amount would be stale or no longer available. *See* 8 U.S.C. § 1101(a)(43) (the term aggravated felony "applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). *See also Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (DHS brought aggravated felony charges against lawful permanent resident over 13 years after conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (DHS initiated removal proceedings nearly 19 years after guilty plea). Under the government's position, immigration judges would be required to conduct mini-trials to determine amount of loss after criminal records have been destroyed or witnesses' memories have faded.

These concerns are compounded for the tens of thousands of non-citizens in removal proceedings who are detained or lack counsel. Between October 2006 and September 2007, "approximately 84% of detained [non-citizens] with completed immigration court proceedings lacked representation." *See* Vera Institute of Justice, Improving Efficiency and Promoting Justice in the Immigration System 1 (2008), *available at* http://www.vera.org/publication_pdf/477_877.pdf; *see*

also Executive Office for Immigration Review, FY 2007 Statistical Year Book O1 (2008), *available at* www.usdoj.gov/eoir/statspub/fy07syb.pdf (non-citizens were detained in 115,017 proceedings completed in 2007). Non-citizen detainees may be unable to locate old criminal records, particularly given DHS's practice of transferring detained non-citizens to remote facilities thousands of miles from their homes and prior criminal court records. *See Immigration Transfers Add to System's Problems, All Things Considered* (National Public Radio broadcast Feb. 11, 2009); *Sasso v. Milhollan*, 735 F. Supp. 1045 (S.D. Fla. 1990) (non-citizen transferred to El Paso detention facility even though witnesses and evidence in his case located in Florida). DHS may initiate removal proceedings anywhere in the country, 8 C.F.R. § 1003.14, regardless of where a non-citizen resides, and the court may only transfer venue if the non-citizen demonstrates good cause (a standard that in practice is difficult for non-citizens to meet). *See* 8 C.F.R. § 1003.20(b).

Finally, the government's open-ended fact-finding approach for determining who falls within the aggravated felony statute ignores the severe consequences associated with the aggravated felony provisions. The INA subjects non-citizens with aggravated felony convictions to mandatory detention pending proceedings and bars these individuals from almost every form of relief from removal, including asylum. *See* 8 U.S.C. § 1158(b)(2)(B)(i) (asylum bar); 8 U.S.C. § 1226(c) (mandatory detention); 8 U.S.C. § 1229b(a) (cancellation of removal bar); 8 U.S.C. § 1229c(a)(1)

(voluntary departure bar). The government's mini-trial proposal disregards Congress's design for the civil removal process, in which immigration judges rely upon the rigor of prior criminal court proceedings before convictions can serve as the basis for a finding of deportability and its attendant harsh consequences.

C. The Pure Categorical Rule and the *Dulal-Whiteway* Approach Promote Uniformity in Immigration Removal Proceedings Across the Country.

In addition to promoting fairness in removal proceedings, the pure categorical and *Dulal-Whiteway* approaches comport with the immigration uniformity principle of the Constitution, which directs Congress to "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Uniformity concerns have motivated the application of the categorical approach in the immigration context for nearly a century. *See, e.g., Mylius*, 210 F. 860 at 863. The Court has given weight to uniformity concerns when interpreting the aggravated felony provisions of the immigration statute. *See Lopez v. Gonzales*, 549 U.S. 47, 59 (2006) (finding "no hint in the statute's text that Congress was courting . . . state-by-state disparity" in application of drug trafficking aggravated felony provisions).

If, as the government suggests, immigration courts engaged in broad fact-finding, the sheer variety of differing state practices with respect to the

contents of criminal records would create unfair variation amongst immigration courts. State laws governing restitution orders, for example, vary regarding many factors, including: (1) the type and amount of proof required;[13] (2) the relevance of the defendant's ability to pay;[14] (3) inclusion of actual versus future losses;[15] and (4) whether restitution may be imposed for acts for which the defendant was not convicted.[16] State restitution orders are thus not

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[13] *Compare, e.g., People v. Gemelli*, 74 Cal. Rptr. 3d 901, 903-04 (Cal. Ct. App. 2008) (under California statute permitting loss to be established based on "amount of loss claimed by the victim ... or any other showing," bare statement of victim in probation report sufficient to support amount of restitution order) *with People v. Wilson*, ___ N.Y.S.2d ___, 2009 WL 396458, *1 (N.Y. App. Div. Feb. 19, 2009) ("unsubstantiated testimony of victim" was insufficient to establish amount of loss in restitution order).

[14] *Compare, e.g., People v. Draut*, 86 Cal. Rptr. 2d 469, 472 (Cal. Ct. App. 1999) (under Cal. Penal Code § 1202.4(g), a defendant's "inability to pay" is not a basis for reducing amount of a restitution order) *with State v. Keener*, 755 N.W.2d 462, 471 (N.D. 2008) (under N.D. Cent. Code § 12.1-32-08(1), court must take into account defendant's ability to pay in determining amount of restitution).

[15] *Compare, e.g., Carswell v. State*, 721 N.E.2d 1255, 1259 (Ind. Ct. App. 1999) ("the trial court may consider only those expenses incurred by the victim prior to the date of sentencing in formulating its restitution order" and therefore future counseling expenses could not be included) *with State v. Grindheim*, 101 P.3d 267, 277 (Mont. 2004) (court could impose restitution for victim's future counseling needs).

[16] *Compare, e.g., State v. Kelly*, 458 N.W.2d 255, 256 (Neb. 1990) (restricting restitution order to loss caused by passing of fraudulent check for which defendant was convicted) *with People v. Bixman*, 433 N.W.2d 417, 418 (Mich. Ct. App. 1988)

(Continued on following page)

simply a direct reflection of loss to the victim. Rather, the relationship to the victim's loss varies by state, and the court may impose an amount of restitution that bears no relation to actual loss. Immigration courts are ill-equipped to decipher the variations in state restitution orders and other criminal records that vary by state and county, particularly given their caseload.[17]

D. Under the Government's Approach, Non-Judicial Immigration Officers Who Make Aggravated Felony Determinations Through Non-Adversarial, Document-Based Processes Could Engage in Open-Ended Fact-Finding.

The fairness problems associated with adopting the government's free-for-all factual inquiry to determine whether a predicate conviction constitutes an

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(upholding restitution order based on losses caused by fraudulent checks for which defendant was not convicted, but which served as part of course of conduct giving rise to conviction).

[17] In fiscal year 2006, approximately 210 immigration judges handled 365,851 matters. Office of Planning, Analysis, & Technology, U.S. Department of Justice, FY 2006 Statistical Year Book B5 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. *See also* U.S. Government Accountability Office, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 12-13 (2006), *available at* http://www.gao.gov/new.items/d06771.pdf (from fiscal year 2000 to fiscal year 2005, number of immigration judges increased by 3% while caseload climbed by 39% and average annual number of cases per judge rose 35% from 1,852 to 2,505).

aggravated felony are compounded when agency officers other than immigration judges make such determinations outside of an adjudicative hearing process. Front-line DHS officers are increasingly responsible for making immigration decisions relating to deportability or other immigration consequences of past criminal convictions,[18] including decisions as to whether a past conviction constitutes an aggravated felony. These decisions typically occur largely based on a paper record, without an adversarial hearing before an independent adjudicator, and sometimes in the absence of the non-citizen.

For example, DHS officers may place non-citizens who they believe are deportable due to "conviction[s] of an aggravated felony" into expedited administrative removal proceedings under 8 U.S.C. § 1228(b). Over half of all removal orders under the aggravated felony provisions are now entered under this expedited administrative removal process.[19] The expedited removal process "expressly exclude[s] the involvement

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[18] *See generally* ABA, American Justice Through Immigrant Eyes (2004), *available at* http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf.

[19] Transactional Records Access Clearinghouse, New Data on the Processing of Aggravated Felons—Administrative versus Immigration Court Orders (2007), *available at* http://trac.syr.edu/immigration/reports/175/ (reporting that, in Fiscal Year 2006, 55% of all removal orders under aggravated felony provisions were administrative orders issued by employees of Immigration and Customs Enforcement in the Department of Homeland Security).

of an impartial adjudicator" and provides "only a paper adjudication" during which "[a] subject need not even be provided with a copy of the evidence on which the charges are based, and the failure to respond on time automatically results in a final deportation order whether or not the allegations are true."[20] Under the government's position, immigration officers placing non-citizens into expedited removal proceedings would arguably be permitted to conduct fact-finding as to prior criminal convictions, without the benefit of an adversarial process or even the presence of the non-citizen, much less the limited process of an immigration court hearing.

Other front-line immigration officers, including detention officers, asylum officers, naturalization officers, border patrol agents, and customs officials, routinely make aggravated felony determinations under the INA. For example, naturalization officers must determine whether a fraud conviction is an aggravated felony because an aggravated felony conviction is a bar to naturalization. 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). *See also* 8 C.F.R. § 316.10(b)(1)(ii) (applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990). These officers make thousands of naturalization eligibility determinations per year, typically based on a paper record and a non-adversarial interview.

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[20] ABA, American Justice Through Immigrant Eyes, *supra* note 18, at 7, 17-18.

See 8 C.F.R. § 335.3; Office of Immigration Statistics, U.S. Department of Homeland Security, 2007 Year Book of Immigration Statistics 52 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (1,383,275 petitions for naturalization filed in 2007).

Other low-level immigration officials who make aggravated felony determinations include asylum officers (because an aggravated felony conviction is a bar to asylum under 8 U.S.C. § 1158(b)(2)(B)(i)), detention officers (because an aggravated felony conviction triggers mandatory detention under 8 U.S.C. § 1226(c)(1)(B)), and immigration officers adjudicating other claims for relief (because relief such as self-petitioning under the Violence Against Women Act under 8 U.S.C. § 1154(a)(1)(C) also incorporates the aggravated felony conviction bar through its good moral character requirement, subject to a narrow waiver). *See also* Center for Battered Women's Legal Services, The Role of the Categorical Approach in Assisting Victims of Domestic Violence and Other Crimes (Feb. 25, 2009), *available at* www.immigrantdefenseproject.org/docs/09_CenterBatteredWomen'sLegalServicesPolicyBrief.pdf. The fairness problems enumerated in *Taylor*, including the inability of criminal records to convey adequately what a jury was actually required to find, variations among cases and records, and the inability of defendants to rely on issues already adjudicated during criminal proceedings, *see Taylor*, 495 U.S. at 601-02, are exacerbated in these non-adversarial contexts.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision from the United States Court of Appeals for the Third Circuit be reversed.

MARCH 4, 2008

Respectfully submitted,

CECILLIA D. WANG
LUCAS GUTTENTAG
CAROLINE P. CINCOTTA
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

JAYASHRI SRIKANTIAH
Counsel of Record
IMMIGRANTS' RIGHTS CLINIC
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

ALINA DAS
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan Street,
5th Floor
New York, NY 10012

DESCRIPTION OF AMICI

The **American Civil Liberties Union (ACLU)** is a non-profit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The Immigrants' Rights Project of the ACLU conducts a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of non-citizens.

The **American Immigration Lawyers Association (AILA)** is a national association with approximately 10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States district courts, courts of appeal, and the Supreme Court of the United States.

The **Asian Law Caucus** promotes, advances, and represents the legal and civil rights of the Asian

and Pacific Islander communities. The Immigrant's Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before immigration courts, the Board of Immigration appeals (BIA) and the Ninth Circuit Court of Appeals.

The **Florence Immigrant and Refugee Rights Project (FIRRP)** provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals, and the circuit courts of appeal.

The **Florida Immigrant Advocacy Center (FIAC)**, a non-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy and education. For more than a decade, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

The **Immigrant Defense Project (IDP)** is a not-for-profit legal resource and training center

dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and therefore has a keen interest in the fair and just administration of the nation's immigration laws.

The **National Immigration Law Center (NILC)** is a non-profit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members, by engaging in policy advocacy and litigation, and providing support to a wide range of organizations and advocates across the country. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process, and NILC has a direct interest in the issues in this case.

The **National Immigration Project of the National Lawyers Guild (National Immigration Project)** is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project

has participated as *amicus curiae* in several significant immigration-related cases before this Court.

The **Northwest Immigrant Rights Project (NWIRP)** is a non-profit legal organization dedicated to the defense and advancement of the rights of non-citizens in the United States. NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Writ Of Certiori To The United States Court Of Appeals For The Third Circuit

BRIEF FOR AMICI CURIAE AKIO KAWASHIMA AND FUSAKO KAWASHIMA IN SUPPORT OF PETITIONER

Jenny Lin-Alva*
Edward O.C. Ord
**Counsel of Record*
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415)274-3800

Thomas J. Whalen
Mark A. Johnston
Gabriella V. Cellarosi
Eckert Seamans Cherin & Mellott, LLC
1747 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202)659-6600

QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million.

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INTEREST OF AMICUS CURIAE

Akio Kawashima and Fusako Kawasima (the "Kawashimas"), as *amici curiae*,[1] submit this brief on the grounds that the decision in the present case may impact the outcome in the matter of *Kawashima v. Mukasey*, Case Nos. 04-743 and 05-74408, currently pending in the U.S. Court of Appeals for the Ninth Circuit.

The Kawashimas are natives and citizens of Japan.[2] The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. In 1997, Mr. Kawashima was charged with subscribing to a false statement on a corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of 26 U.S.C. § 7206(2). Mr. Kawashima pled guilty to the charge, and like petitioner Nijhawan, entered a plea agreement wherein he stipulated that the "total actual tax loss" was $245,126. The stipulation was solely for the purpose of determining his offense level under the Sentencing Guidelines and included amounts for other years and another entity for which he did not

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[1] Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

[2] Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

plead guilty. The plea agreement for sentencing further stipulated that Mr. Kawashima could be ordered to pay the same amount in restitution. Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return but no amount of loss was stipulated in the plea agreement for sentencing or other purposes.

On August 3, 2000, the Immigration and Naturalization Service initiated removal proceedings against the Kawashimas alleging removability under 8 U.S.C. § 1101(a)(43)(M)(i). After holding a removal hearing, the Immigration Judge ("IJ") concluded the Kawashimas were removable on the grounds that their guilty pleas "constituted aggravated felonies under the removal statute."

Section 7206 makes it a crime to file a false and untrue statement on a federal tax return whether or not the Government suffers a revenue loss.

The Board of Immigration Appeals ("BIA") later affirmed the decision of the IJ. The Kawashimas then separately filed timely petitions for review of the BIA's decision with the U.S. Court of Appeals for the Ninth Circuit, which were consolidated.

Initially, the petition for review was denied with regard to Mr. Kawashima, but was granted with regard to Mrs. Kawashima and her order of removal was vacated. *See Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007). Upon Mr. Kawashima's request for rehearing, the Ninth

Circuit reversed its prior ruling and found that monetary loss was not an element of the Kawashimas' crimes of conviction.[3] The Ninth Circuit found that the Government failed to show that Kawashimas' convictions were aggravated felonies under the categorical approach or the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005). The court further held that under the categorical approach, the record of the Kawashimas' convictions and sentencing stipulations could not be reviewed to determine whether they were found guilty to causing a loss in excess of $10,000. *See Kawashima v. Mukasey*, 530 F.3d 1111, 1117 (9th Cir. 2008).

On September 15, 2008, the Government filed a Petition for Rehearing *En Banc*, which the Kawashimas opposed. On January 23, 2009, the Government requested that the Ninth Circuit consider holding the proceedings in *Kawashima* pending disposition by this Court of the present matter. On February 2, 2009, the Kawashimas opposed the Government's request urging that the decision be finalized as correct. To date, the Ninth Circuit has taken no further action.

The issue before the Court in the present case is one of the issues before the Ninth Circuit in *Kawashima*. Because the decision of the Court in

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[3] The Ninth Circuit granted rehearing as to both the Kawashimas even though the petition for rehearing was filed only on behalf of Mr. Kawashima and discussed issues only as to Mr. Kawashima's crime of conviction.

this case may affect the rights of the Kawashimas, *amici* qualify as interested parties pursuant to Rule 37 of the Supreme Court Rules and respectfully submit this brief in support of the petitioner.

SUMMARY OF ARGUMENT

The removal (deportation) statute, 8 U.S.C. § 1227(a)(2)(A)(iii), requires, in express terms, that an alien is removable if *convicted* of an *aggravated felony* as defined. The aggravated felony, required in the petitioner's case, is a conviction of a crime of "fraud and deceit in which the loss to the victim or victims exceed $10,000." Neither petitioner Nijhawan nor Amici Akio Kawashima and Fusako Kawasima were convicted of such an aggravated felony and any order of removal in their cases plainly violated the statute.

The Third Circuit ignored the plain language of Congress and attempted to sidestep the constitutional principle that the alien must be convicted of an aggravated felony beyond a reasonable doubt. Because the crime of conviction did not satisfy the aggravated felony as defined, the Third Circuit erroneously filled in the gaps with less than proof beyond a reasonable doubt.

The Court below failed to follow the categorical or modified categorical approach set forth by the Court in *Taylor v. United States*, 495 U.S. 575 and *Shepard v. United States*, 544 U.S. 13 (2005), which was recently reaffirmed by the Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007).

The core principles of *Duenas-Alvarez* govern the case at bar. The crime of conviction must fall with the "listed" offense (aggravated felony) and that determination is a question of law, using the categorical approach of *Taylor* and ensuring that all the elements of the aggravated felony were established beyond a reasonable doubt.

Amici contend that the governing statute is absolutely clear and that the order of removal of Nijhawan as decided by the Court below was erroneous. Should the Court find ambiguity in the statute, however, the Court should apply the rule of lenity because of the catastrophic consequences of removal, both for Nijhawan and the *Amici,* and because of the inevitable uncertainty that will ensue if any "tethering" or fact-finding process espoused by the Third Circuit is allowed.

The Third Circuit's "tethering" approach is contrary to the plain language of the statute, as well as the decisions of the Court in *Taylor*, *Shepard* and *Duenas-Alvarez*. In addition, it is constitutionally impermissible for a Court to fill in blanks of a crime of conviction by proof less than proof beyond a reasonable doubt in order to squeeze the crime of conviction into the term aggravated felony.

The decision of the Third Circuit is erroneous and should be reversed.

ARGUMENT

I. The Plain Language of 8 U.S.C. § 1101(a)(43)(M)(i) Requires that the Loss Requirement be Established in the Crime of Conviction.

Pursuant to 8 U.S.C. §1227(a)(2)(A)(iii), an "...an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis added). The statute lists over 15 crimes constituting an aggravated felony under 8 U.S.C. § 1101(a)(43). An "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) is a crime that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Subsection (M)(i) cannot be interpreted so that part of the definition, "fraud or deceit," defines the crime of conviction and the rest is severed and irrelevant to the definition that Congress enacted. "A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on the context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Since subsection (M)(i) defines one of the aggravated felonies for which an alien defendant is removable, an alien defendant can be removed pursuant to that subsection only when a conviction satisfies the entire definition of subsection (M)(i), namely that the alien is *convicted* of an *aggravated felony*.

The use of the words "in which" mandates that the loss requirement be a part of the crime of conviction. The Ninth Circuit has held that the phrase "in which" is not merely a qualifying term, but rather makes clear that the loss requirement is

an element of the generic crime of "fraud and deceit." *See e.g.*, *Kawashima*, 530 F.3d at 1117 ("We have consistently interpreted Subsection M(i)'s monetary loss requirement as an 'element' of the generic offense, which the record of petitioner's conviction must demonstrate that the jury actually found or the petitioner (as defendant) necessarily admitted.") (citations omitted).

In contrast, Congress defined an aggravated felony in 8 U.S.C. §1101(a)(43)(G) to include a theft "*for which* the term of imprisonment [is] at least one year." (emphasis added). In this example, it is clear that the phrase "for which" was intended to signify a qualifier because a term of sentence clearly can never be an element of the prior offense. The use of the different phrase "in which" in subsection (M)(i) evidences the fact that "Congress act[ed] intentionally and purposefully." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). The phrase "in which" cannot be interpreted to have the same purpose as the phrase "for which," as the Third Circuit held in *Nijhawan v. AG of the United States*, 523 F. 2d 387 (3d Cir. 2008).

A plain reading of the text of 8 U.S.C. § 1101(a)(43)(M)(i) requires that the loss requirement be an element of the aggravated felony and be established in the crime of conviction.

II. Subsection (M)(i) Requires Application of the Categorical Approach Set Forth in *Taylor* and *Shepard*.

Section 1101(a)(43) defines the term aggravated felony, a concept that implicates both civil immigration and criminal consequences of a prior conviction. An alien convicted of an aggravated felony after admission is deportable. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Similarly, an alien who returns to the United States after removal for an aggravated felony is subject to an enhanced statutory maximum sentence of twenty years in prison. *See* 8 U.S.C. § 1326(b)(2). Since both sections 1227(a)(2)(A)(iii) and 1326(b)(2) predicate the catastrophic consequences to an alien upon a conviction suffered, the plain language of both statutes requires application of *Taylor v. United States*, 495 U.S. 575 (1990).

In *Taylor*, this Court instructed that "the trial court [may] look only to the fact of the conviction . . ." *Id.* at 602. Where the jury was "actually required [ ] to find all the elements of [the] generic [offense] in order to convict the defendant," the sentencing court may consider the charging paper and jury instructions as well. *Id.* *Taylor* permits the consideration of limited documents of undisputed import in addition to the fact of conviction only when an element in the statutory definition of the prior offense (the crime of conviction) includes conduct that constitute both a removable offense and not a removable offense. The Court did not permit an inquiry into the underlying facts of the conviction that a jury was not required to find. *See also Shepard v. United States*, 544 U.S. 13 (2005).

Section 1101(a)(43)(M)(i) was first added in 1994, *see* P.L. 103-416 § 222, 108 Stat. 4321-22, four years after the *Taylor* decision established that the categorical analysis applies to criminal enhancement statutes. By that time, the most severe penalties under 8 U.S.C. § 1326(b)(2) were available only as to aggravated felons. Subsection (M)(i) was adopted several years after *Taylor*, yet no language of the statute or legislative history disavows application of the *Taylor* paradigm, of which Congress was presumably aware. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Equally important, the Court has upheld the *Taylor* paradigm on removal matters. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

Amici urges the Court to follow its recent decision in *Duenas-Alvarez*, as petitioner has also urged. *Duenas-Alvarez* controls the determination of the issue presented by petitioner, as well as one of the issues in Kawashimas' case.

The Court in *Duenas-Alvarez* made several controlling points:

(1) The crime of conviction must "fall[] within the scope of the listed offense . . ." (8 U.S.C. § 1101(a)(43)). 549 U.S. at 185-186 (citing *Taylor*) (additional citations omitted);

(2) Whether the crime of conviction is within the listed offense is a question of law; that is, fact finding is not permitted;

(3) To make the determination that the crime of conviction did fall within the listed offense (sometimes called the "generic" felony), the Court approved, in removal cases, the "categorical" and "modified categorical" approach set forth in *Taylor* and *Shepard*; and

(4) To determine whether the crime of conviction is one of the listed offenses, courts may consider only those records of conviction that establish, as a matter of law, that the elements of the listed generic crime, and each of them, were established beyond a reasonable doubt in the record of the crime of conviction.[4]

The Third Circuit in *Nijhawan* did not address or mention *Duenas-Alvarez* or its core principles. Under *Duenas-Alvarez*, *Taylor* and *Shepard*, "tethering" or fact finding by a court is not allowed for obvious constitutional reasons. *See also*, *United States v. Hayes*, 555 U.S. __ (February 24, 2009).

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[4] In the recent decision of the Court, *United States v. Hayes*, 555 U.S. __ (February 24, 2009), the Court made the point that the "domestic relationship" must be established beyond a reasonable doubt, to qualify as "as misdemeanor crime of domestic violence" under the Federal Gun Control Act of 1968, as amended, 18 U.S.C. § 921.

III. If Subsection (M)(i) is Ambiguous, the Rule of Lenity Must Apply.

As petitioner has argued, the rule of lenity should be applied to the *Nijhawan* case, as well as to all other like cases, if the Court finds the statute ambiguous, which *amici* argue in Part I is not ambiguous. This longstanding principle directs that "[t]he rule of lenity is that criminal statutes, including sentencing provisions, are to be construed in favor of the accused." *Taylor v. United States*, 495 U.S. 575, 596 (1990). The Court, in *Fong Haw Tan v. Phelan*, explained that "[w]e resolve doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." 333 U.S. 6, 10 (1948).

Should the Court not apply the rule of lenity, the penalties could be severe and irreversible for the Kawashimas in light of the fact that under the categorical approach set forth in *Taylor*, the statutes under which the Kawashima's were convicted did not require the government to prove the amount of revenue loss. To the extent this Court does not find that the categorical approach or the modified categorical approach applies to subsection (M)(i), or that the statute is ambiguous, the rule of lenity should be followed because individuals who accepted plea agreements as to conviction, but did not agree to a loss amount, such as the Kawashimas, face the

serious penalty of deportation as a result of the vagueness in the statute. Accordingly, the longstanding rule of lenity should apply in the instant case, as well as to all other cases which occurred prior to the Court's decision in this matter.

IV. The Third Circuit's Interpretation of Subsection (M)(i) in *Nijhawan* is Constitutionally Doubtful.

Assuming, *arguendo*, any ambiguity in the statutory scheme, the interpretation of subsection (M)(i) in *Nijhawan* must also be rejected as constitutionally impermissible. The Court has long adhered to the principle that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The Court has explained that, "[i]t is out of respect for Congress, which we assume legislates in the light of constitutional limitations, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), that we adhere to this principle, which 'has for so long been applied by this Court that it is beyond debate.'" *Jones*, 526 U.S. at 240 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Shepard held that the constitutional doubt canon supported a narrow construction of the *Taylor* categorical approach. *See* 544 U.S. at 24-26.

Shepard observed that where all the requisite elements are present in the record of the prior conviction used to enhance a sentence, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), any constitutional concerns under *Apprendi* is avoided. *See Shepard*, 544 U.S. at 25 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). But when facts beyond the elements are at issue, disputes on those facts "raise[] the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of the potential sentence." *See Id.* Thus, the Ninth Circuit correctly recognized that: "Sixth Amendment concerns *are* implicated when courts stray from the *Taylor* approach and make findings *about* the prior conviction by referring to sources outside the formal record of conviction." *United States v. Brown*, 417 F.3d 1077, 1080 n.4 (9th Cir. 2005) (emphases in original).

The Third Circuit's construction of subsection (M)(i) is constitutionally flawed because it obliges courts to "stray." The Third Circuit's interpretation of subsection (M)(i) and its notion of "tethering" impermissibly allows courts to make findings of fact as to prior convictions that determine the statutory maximum under certain offenses under 8 U.S.C. § 1326(b)(2) and which are not limited solely to the fact of conviction. The Third Circuit in *Nijhawan* endorsed reliance on "a restitution order, which by its nature is neither found by a jury nor specifically pled to by a defendant," 523 F.3d at 394, holding that "the loss requirement invites further inquiry

into the facts underlying the conviction, and that inquiry is satisfied if the amount of loss is sufficiently tethered to the fraud conviction." *Id.* at 397. This construction is constitutionally impermissible because it would allow sentencing courts, not juries, to make factual findings regarding facts underlying prior offenses used to authorize increased penalties under 8 U.S.C. § 1326(b)(2). *Apprendi*, 530 U.S. at 490.

V. Any Approach which Permits Independent Fact Finding or "Tethering" is Constitutionally Impermissible.

The categorical approach must be employed as opposed to any approach which permits independent fact finding or "tethering." If the categorical approach is not employed, "it will often be necessary to go beyond the fact of conviction and engage in an elaborate fact-finding process regarding the defendant's prior offens[e]." *Hayes*, 555 U.S. at 7 (Roberts, C. J., dissenting) (citing *Taylor*, 495 U.S. at 601 (1990)). Chief Justice Roberts' recent dissent in *Hayes* recognized that that, "the practical difficulties and potential unfairness of a factual approach are daunting." *Id.* The Ninth Circuit has rejected a fact finding approach where the crime of conviction is missing an element of the generic crime because it is impossible to find that "a jury was actually required to find all the elements of" the generic crime. *See Li v. Ashcroft*, 389 F. 3d 892, 899-901 (9th Cir. 2004) (Kozinski, J., concurring). In such cases, "[t]he crime of conviction can never be narrowed to conform to the generic crime because the jury is not required—

as *Taylor* mandates—to find all the elements of the generic crime." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007).

In *Li v. Ashcroft*, 389 F. 3d 892, 900 (9th Cir. 2004), the Ninth Circuit was "especially reluctant to rely solely on the charging document and the judgment to establish a fact that the government was not required to prove, and the jury was not required to find, to convict [Li]." The fact that:

> [the] sentencing judge did find by a preponderance of the evidence that [Li] and his associates were responsible for losses amounting to much more than $10,000...does not satisfy the requirement that the defendant ha[s] been convicted of each element of the generic crime.

Id. at 898. In his concurring opinion, Chief Judge Kozinski stated that an approach which permitted a fact finding related to the underlying offense was "unfair to defendants because it denies them notice and a reasonable opportunity to rebut the charges against them." *Id.* at 900. A defendant does not have reason to challenge the government's proposed amount of loss if it is not an element of the crime. *Id.* ("Since the amount of loss wasn't an element of the charges against Li, he had no reason to believe it would be relevant to his conviction, and thus no reason to cast doubt on the government's evidence as to the amount of loss."). The same is true with respect to plea agreements which include an amount of loss for sentencing purposes only. *See e.g.*,

Navarro-Lopez, 503 F.3d at 1073 n. 10 ("The same analysis applies in cases . . . where courts review plea agreements instead of jury verdicts.").

Any approach which permits an inquiry into the facts beyond the elements necessary for conviction would result in an erroneous application of subsection (M)(i). For example, in *Kawashima*, the respective statutes of convictions clearly did not require the government to prove the amount of loss that the Kawashimas' actions caused. Mr. Kawashima pled guilty to subscribing to a false statement on a tax return. Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return. The Kawashimas could be convicted of violating §§ 7206(1) and 7206(2) without there being a revenue loss to the Government, unlike tax evasion, which requires a revenue loss for conviction. In any event, there was no requirement to find them guilty beyond a reasonable doubt of causing a monetary loss in excess of $10,000 as amount of loss was not an element in their predicate offenses.[5]

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[5] The Kawashimas do not concede that the Government qualifies as a "victim" who suffered a "loss . . . in excess of $10,000" pursuant to 8 U.S.C. § 1101(a)(43)(M)(i) as a result of their plea agreements for violation of 26 U.S.C. §§ 7206(1) and (2). The Government can certainly be a "victim" like any individual or firm, for example, in the case of embezzlement against the United States. *See Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005). As a matter of statutory construction, Mr. Kawashima's conviction on a tax violation under 26 U.S.C. § 7206(1) was not a removable offense. The *only* tax offense which is removable is tax evasion under 26 U.S.C. § 7601 where a *revenue* loss is required to be

In Mr. Kawashima's case, his tax violation involved intentionally making a false statement as to a material fact on his return pursuant to 26 U.S.C. § 7206(1). His conviction did not require a revenue loss. *United States v. Di Varco*, 484 F.2d 670, 672-3 (7th Cir. 1973), cert. denied 415 U.S. 916 (1974) (§ 7206(1) conviction upheld for falsely reporting the source of income even though there was no tax deficiency); *see also United States v. Helmsley*, 941 F.2d 71, 92-93 (2d Cir. 1991). An intent to evade taxes, under 26 U.S.C. § 7601, requires a specific intent to evade which is an aggravated felony, if there is a $10,000 loss as a result. There is no finding of a $10,000 loss evidenced in the record of the conviction presented. The plea agreement contained a hypothetical figure for tax loss only for sentencing purposes. *Kawashima*, 530 F.3d at 1118.

The Kawashimas merely made stipulations of fact in order to assist the court in determining offense levels and restitution. Any approach, therefore, which permits fact finding beyond the conviction or plea of guilt would be unfair to a defendant facing removal proceedings who had no reason to challenge the amount of loss in the underlying proceeding, or who agreed to an amount of loss for narrow purposes other than conviction.

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found. *See Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004) (Alito, J., dissenting).

CONCLUSION

For the reasons set forth herein, *amici* urge that the Court should reverse the decision of the Court below and set aside Nijhawan's order of removal and deportation.

Respectfully submitted,

Jenny Lin-Alva*
Edward O.C. Ord
*Counsel of Record
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415)274-3800

Thomas J. Whalen
Mark A. Johnston
Gabriella V. Cellarosi
Eckert Seamans Cherin &
Mellott, LLC
1747 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202)659-6600

AMICUS CURIAE BRIEF

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MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, NATIONAL COUNCIL OF LA RAZA, *et al.*, IN SUPPORT OF PETITIONER

VINCENT A. ENG
Counsel of Record
KAREN K. NARASAKI
TUYET DUONG
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
(202) 296-2300

DAVID A. KETTEL
JACKIE M. JOSEPH
DONALD W. YOO
JOSHUA D. BRITTINGHAM
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(310) 229-9900

Counsel for Amici Curiae

[*Additional Amici listed on inside cover*]

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ADDITIONAL *AMICI CURIAE*

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INTERESTS OF *AMICI CURIAE* [1]

The classification of a criminal offense as an "aggravated felony" under the Immigration and Nationality Act ("INA") triggers the most severe consequences possible under this nation's immigration laws. These include: (1) ineligibility for asylum, cancellation of removal, and voluntary departure[2]; (2) subject to mandatory detention without bond[3]; (3) bar from re-admission into the United States[4]; (4) imprisonment of up to twenty years for returning to the United States unlawfully[5], and (5) permanent bars to citizenship[6].

Notwithstanding these severe consequences, deportations of immigrant individuals reached a fifth consecutive high in 2007: Immigration and Customs Enforcement's ("ICE") Office of Immigration Statistics

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

[2] 8 U.S.C. §1229b(3); 8 U.S.C. §1229c(b)(1)(C); and 8 U.S.C. §§1158(b)(2)(A)(ii) and (B)(i).

[3] 8 U.S.C. §1226(c)(1)(B).

[4] 8 U.S.C. §§1182(a)(9)(A)(i) and (ii).

[5] 8 U.S.C. §1326(b)(2).

[6] 8 U.S.C. §1101(f)(8).

recently reported that it had apprehended nearly 961,000 foreign nationals and had removed more than 319,000 individuals.[7] The cases of over 99,000 of the individuals that ICE removed in 2007 involved allegations of past criminal activity.[8]

In this context, the recent attempts to broaden the Immigration Judge's ("IJ") inquiry into alleged facts underlying an individual's past criminal conviction, and the record numbers of individuals detained and removed due to ICE's renewed efforts to enforce our nation's immigration laws, leaves our communities with separated families, devastated children, and economic hardship. Some of the individuals impacted by deportation include parents who are sole providers for their families and have been longtime legal permanent residents in this county who have committed only a single crime during their entire lives in the United States. Many of the children separated from their parents are United States citizens who have never stepped foot in their parents' native countries or who do not speak the language of their parents' country of origin.[9]

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[7] U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2007 ANNUAL REPORT (2008), *available at www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.*

[8] *See id.*

[9] *See* David Thronson, *Immigration Raids and the Destablization of American Families*, WAKE FOREST L. REV. (2008); NATIONAL COUNCIL FOR LA RAZA AND THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007); *Forced Apart: Families Separated and Immigrants Harmed by U.S. Deportation Policy*, HUMAN RIGHTS WATCH, July 2007.

In a time of unprecedented economic hardship and uncertainty for many families in our nation and abroad, this Court should reject an approach to analyzing an immigrant's criminal conviction that does not comport with due process and, if applied, may yield different results for individuals with similar offenses. Each immigrant family goes through its own private pain of deciding whether to invest precious resources, time, and money into building an immigration case. These families and their counsel should be able to make decisions based upon consistent and objective legal standards that yield predictable results under our immigration laws. Further, requiring the application of uniform legal standards in analyzing an immigrant's criminal conviction will minimize the opportunities for politically minded individuals, including IJs, to make decisions in immigration cases based upon political ideology or personal biases.[10]

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[10] It was recently uncovered that high-ranking officials at the U.S. Department of Justice ("DOJ") violated DOJ policy and federal law by using overt political and ideological considerations when filling key DOJ jobs such as immigration judges, according to a report issued by the DOJ's Inspector General's Office ("OIG Report"). Federal law and DOJ policy require career officials to be hired on merit and prohibit discrimination based on political affiliations. The OIG Report found that immigration judgeships were especially targeted for politicization: "we were only considering essentially Republican lawyers for appointment," Kyle Sampson stated, according to the OIG's report. Prior to 2004, immigration judges were appointed in an essentially non-political bureaucratic process handled by the Office of the Chief Immigration Judge. Vacancies were posted, interviews conducted and decisions

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The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings. Joining the AAJC as *amici curiae* in this brief are sixteen public interest, national advocacy, and civil rights organizations whose members or constituencies, often longtime lawful permanent residents, face the real world consequences of being separated from their families and being removed permanently from the United States.

The AAJC, and the *amici curiae* listed in the Appendix, respectfully submit this brief to apprise the Court of the real and unequitable consequences of going beyond the record of conviction when determining whether a criminal conviction renders an individual removable.

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made by lower-level DOJ officials. Kyle Sampson's new process involved "coordination" with White House and an extra effort to get friends of the Bush administration into the judgeships when possible. *See* DOJ Office of Inspector Gen., An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (2008), *available at* http://www.usdoj.gov/oig/special/s0807/index.htm.

BACKGROUND

Despite the harsh consequences of an aggravated felony designation, immigration courts continue to struggle with applying consistent and predictable legal standards when determining whether an immigrant's conviction qualifies as an aggravated felony. Nowhere is this struggle for clarity and uniformity more apparent than in the differing standards employed by courts in analyzing whether an immigrant's conviction "involves fraud or deceit," under 8 U.S.C. § 1101(a)(43)(M)(i) (2008), and more specifically, the differing standards applied when analyzing whether "the loss to the victim or victims exceeds $10,000."

The categorical approach, summarized in *Taylor v. United States*[11] and *Shepard v. United States*,[12] is the traditional method for determining whether a particular conviction falls within the definition of an aggravated felony under the INA. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007). Broadly speaking, the categorical approach can take two forms. The first, commonly referred to as the "formal categorical approach," limits a court's analysis to the fact of conviction (excluding the facts underlying the conviction itself) and the legal elements of the statutory offense to determine whether those elements are congruent with the elements of the removal ground. *See id.* at 187-88; *Taylor*, 495 U.S. 575; *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008). The second, commonly referred to as the "modified categorical approach," applies where a

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[11] 495 U.S. 575 (1990).

[12] 544 U.S. 13 (2005).

criminal statute is broader than the ground of removability. In that case, courts generally undertake a narrow circumscribed inquiry into whether what was established in the adjudication of guilt would subject the immigrant to removability. *Duenas-Alvarez*, 549 U.S. 183; *Taylor*, 495 U.S. at 602. A number of courts, including the Second, Ninth, and Eleventh Circuits, have applied the modified categorical approach in which they consider a narrow, specified set of documents that are part of the record of conviction in order to determine whether an immigrant's conviction satisfies the $10,000 loss requirement of section 1101(a)(43)(M)(i).[13]

In contrast, however, other courts, including the First, Third, and Fifth Circuits, have abandoned the "modified categorical approach" in favor of a more arbitrary standard, most recently coined by the Third Circuit as the "tethering" approach, which looks to see whether the "tether" of a loss in excess of $10,000 is sufficiently strong for purposes of section 1101(a)(43)(M)(i).[14] *See Nijhawan v. Att'y Gen. of the United States*, 523 F.3d 387, 395 (3d Cir. 2008). The adoption of the Third Circuit's "tethering" approach, as compared to the "modified categorical approach," would make it exponentially more difficult for IJs to determine whether the $10,000 loss amount was satisfied, and would invite IJs to conduct "mini-trials" during immigration hearings that may include new

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[13] *See Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008); *Dulal-Whiteway v. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007); *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007).

[14] *See Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006).

testimony and evidence not subject to the strictures of the rules of evidence and due process required in criminal proceedings.[15]

Under the more arbitrary standard of the First, Third, and Fifth Circuits, individuals with the same convictions may face different results depending on alleged facts beyond what was established by the conviction. Such disparate treatment of individuals similarly situated raises significant due process concerns. The need for a predictable and objective standard to determine whether a conviction qualifies as an aggravated felony is of paramount importance given burgeoning immigration caseloads, overworked federal courts, diminishing government resources, and statutory time constraints mandated by immigration laws. Adoption of the "modified categorical approach" in which courts can consider a narrow and specified set of court documents that reflect the facts upon which the conviction actually and necessarily rested will provide greater predictability, consistency, and transparency for both the immigration courts and the criminal justice system at large. To be sure, criminal defendants subject to removability based upon their convictions need concise and uniform standards in which to base their plea decisions. Absent such objective standards, criminal defendants will lack the ability to meaningfully consider the full range of consequences of their guilty pleas and whether such pleas may result in their removal from this country — a punishment that is in many instances far greater and punitive than

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[15] *See Amici Curiae* Brief filed by the American Civil Liberties Union, at 22-27.

incarceration. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living"); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (deportation is a "sanction which in severity surpasses all but the most Draconian criminal penalties."); *United States v. Gonzalez-Medonza*, 985 F.2d 1014, 1016 (9th Cir. 1993) ("Deportation is a sanction as harsh or harsher than many sanctions provided by the criminal law.").

The arguments and case stories in this brief illustrate the concerns of *amici* and the important role the categorical approach plays in ensuring accurate and reliable determinations of whether immigrants in our communities should be subject to the serious consequences of being labeled an "aggravated felon."

SUMMARY OF ARGUMENT

The categorical approach set forth in *Taylor* and *Shepard* should govern the determination of whether the conviction or guilty plea of an immigrant constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). Under this analysis, a conviction is an aggravated felony where either: (1) a violation of the underlying statute of conviction necessarily involves every element of an aggravated felony; or (2) where the underlying offense is broader than the underlying offense and the jury was actually required to find all the elements of an aggravated felony. *See Taylor*, 495 U.S. 575; *Shepard*, 544 U.S. 13, 19-20; *Kawashima*, 530 F.3d at 1116.

The formal categorical approach most effectively ensures uniform application of immigration law and

avoids gross inequities to immigrants. Under this approach, Petitioner's conviction would not qualify as an aggravated felony under section 1101(a)(43)(M)(i). However, should this Court inquire beyond the formal categorical approach, this Court should adopt the well-accepted modified categorical approach applied by the Second, Ninth, and Eleventh Circuits. This Court should reject the ambiguous and subjective "tethering" approach of the Third Circuit adopted in the case below because it is ambiguous and will undoubtedly result in additional litigation to further define the parameters of that ill-defined standard. Meanwhile, immigration courts will struggle with the application of the "tethering" approach to determine whether an immigrant's conviction constitutes an aggravated felony. Therefore, the "tethering" standard should be rejected in favor of the modified categorical approach with a clear delineation that certain documents, specifically restitution orders, presentence investigative reports, and similarly unreliable sentencing documents, may not be considered or relied upon in determining the amount of loss under section 1101(a)(43)(M)(i).

Amici argue that the seriousness of an aggravated felony designation dictates a more careful and predictable standard for assessing convictions than the "tethering" approach. To illustrate the dangers of the "tethering" approach in the fraud-loss context, *amici* use case stories to show that restitution orders and other sentencing documents often go beyond the conviction in calculating loss amounts.

ARGUMENT

I. The Harsh Consequences Of An Aggravated Felony Mandate Careful And Accurate Review Of A Conviction To Determine Whether An Individual Qualifies As An Aggravated Felon.

Because Congress considers aggravated felonies "the most serious offenses" covered by the immigration laws, H.R. Rep. No. 109-345(I), at 69 (2005), it has reserved the most severe consequences for these offenses.

A. Permanent Removal From The United States

The INA provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). There is no requirement that the crime be committed within a certain number of years from the date of admission. In fact, immigrants are often detained and placed in removal proceedings five, ten, or even twenty years after conviction of an aggravated felony. *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a non-citizen deportable under a removal order issued twenty years after the conviction). Neither does it matter how long an individual has resided in the United States. *See, e.g., Ayala-Chavez v. INS*, 944 F.2d 638, 640 (9th Cir. 2001) (finding an 18-year resident deportable even though most of his family resided near him and he had a minor daughter whom he supported). Individuals who are deported based on aggravated felonies face a permanent bar to returning to the United States. 8 U.S.C. § 1182(a)(9)(A)(ii).

B. Asylum

Asylum is a form of relief available to a non-citizen who fears persecution in his or her country of origin on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B)(i). Similar to asylum, withholding of removal is a form of relief available to some otherwise deportable non-citizens whose "life or freedom" would be threatened on account of the same five factors. 8 U.S.C. § 1231(b)(3)(A). Unlike asylum, the relief of withholding of removal may not lead to permanent residence or naturalization, but usually serves as the last resort for removable individuals who would face extreme forms of persecution, torture, or even death should they return to their home country.

A non-citizen convicted of an aggravated felony, however, is permanently barred from seeking asylum. 8 U.S.C. § 1158(b)(2)(B)(i). Under the INA, an immigrant is ineligible for asylum if "convicted by a final judgment of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(A)(ii). Aggravated felonies count as particularly serious crimes. *See id.*, § 1158(b)(2)(B)(i). Additionally, a non-citizen convicted of an aggravated felony is presumptively ineligible for withholding of removal. *See In re Y-L-*, 23 I. & N. Dec. 270, 273 (BIA 2002); 8 C.F.R. § 208.16(d)(2).

C. Mandatory Detention

Under 8 U.S.C. § 1226(c)(1), individuals in removal proceedings because of an aggravated felony conviction are subject to mandatory detention and thus ineligible for bond even if they can demonstrate that they are not a flight risk or danger to the community. Aggravated felons may be held in ICE custody for many months, or even years, before having their cases adjudicated. *See, e.g., Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (immigrant detained for over two years by DHS during removal proceedings in which immigrant was charged with removability for being an aggravated felony); *Valansi v. Reno*, 278 F.3d 203 (3d Cir. 2002) (immigrant detained for nearly a year under section 1226(c) during pendency of removal proceedings).

D. Unlawfully Entering The United States

Under 8 U.S.C. § 1326, non-citizens who unlawfully enter or re-enter the United States are subject to an array of penalties. All illegal entrants are subject to fines and prison terms. The most serious penalties – a fine, imprisonment for up to twenty years, or both – are reserved for non-citizens who were previously convicted of an aggravated felony. 8 U.S.C. § 1326(b)(2). In addition, anyone who aids or assists an aggravated felon in unlawfully reentering the United States faces a fine and/or up to ten years in prison. 8 U.S.C. § 1327.

E. Naturalization

Under 8 U.S.C. § 1427(a), an individual who wishes to naturalize must demonstrate "good moral character." But the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . one who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f). An aggravated felony is thus an automatic and permanent barrier to naturalization.

F. Violence Against Women's Act ("VAWA")

Through VAWA, Congress created a procedure that allowed battered immigrant women and their children to flee violent marriages without risking deportation.[16] VAWA permits abused spouses and their children or abused children and their parents to "self-petition" for lawful permanent resident status without the cooperation of the abusing relative or seek cancellation of removal. 8 U.S.C. §§ 1254(a)(1)(A) and (B). These provisions are intended to protect immigrant women and children whose batterers attempt to use their immigrant status as a means of inflicting physical, mental, emotional, and economic abuse on them. However, an applicant for a VAWA self-petition must demonstrate "good moral character." *See* 8 U.S.C. § 1254(a)(3); 8 C.F.R. § 204.2(c)(2)(v). As an aggravated felony precludes a finding of "good moral character," battered spouses and their children would be unable to seek relief under VAWA should they be found to have committed an aggravated felony.

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[16] Pub. L. No. 103-322, 108 Stat. 1941-42 (1994).

Eroding the categorical approach in the aggravated felony context brings more immigrants into the categories for which Congress intended the harshest consequences. This has the potential to lead to unintended results. For example, immigration attorneys who advise victims of domestic violence have relied on adjudicators' longstanding use of the categorical approach in assessing how their client's prior convictions will affect their eligibility for relief under VAWA. As one advocate puts it, "[t]hese are precisely the types of assessments that we need to do quickly and with relative certainty as to result, particularly given the time-sensitive and often dangerous situations our clients face while their immigration status is uncertain."[17] Eroding that categorical approach, even in the limited context of section 1101(a)(43)(M)(i), will cause unintended consequences in these adjudications.[18]

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[17] *See* CENTER FOR BATTERED WOMEN'S LEGAL SERVICES, THE ROLE OF THE CATEGORICAL APPROACH IN ASSISTING VICTIMS OF DOMESTIC VIOLENCE AND OTHER CRIMES APPLY FOR U NONIMMIGRANT STATUS AND VAWA SELF-PETITIONS 4 (2009), *available at* http://www.immigrantdefenseproject.org/docs/09_Center-BatteredWomen'sLegalServicesPolicyBrief.pdf.

[18] *See id.* at 3-4

> if an underlying factual inquiry is permitted as to the loss amount, we would need to talk to our client in much more depth about the underlying facts alleged as part of any restitution and possibly seek out experts in loss calculations of the sort involved in her case to show that the loss was not related to her convicted conduct. This type of assessment is so fundamentally different from the work that any of us as immigration lawyers would normally do that it is unclear how we could make those assessments fairly and accurately for our clients.

II. The Categorical Approach Set Forth In *Taylor* And *Shepard* Should Govern As To Whether Petitioner's Conviction Constitutes An Aggravated Felony Under Section 1101(a)(43)(M)(i).

Under the strict categorical approach articulated in *Taylor* and *Shepard*, the failure of Petitioner's statute of conviction to contain a loss provision exceeding $10,000 is fatal to an aggravated felony determination. Indeed, as the Ninth Circuit has held, *Taylor* and *Shepard* require that "the statute of conviction must contain every element of the generic offense before we resort to the modified categorical approach." *Kawashima*, 530 F.3d at 1116; *see United States v. Gonzales-Terrazas*, 529 F.3d 293, 297-98 (5th Cir. 2008). As the statute under which Petitioner was convicted does not contain a loss amount, the inquiry whether that conviction qualifies as an aggravated felony should go no further. To find otherwise would result in gross inequities to those immigrants who pleaded guilty of a charge in which the amount of loss calculated was less than the $10,000 threshold, anticipating that the plea of guilty would place the conviction outside the scope of section 1101(a)(43)(M)(i).

However, if the Court's inquiry goes beyond the strict categorical approach, the Third Circuit's "tethering" analysis should be rejected in favor of the more objective and predictable modified categorical approach to determine whether Petitioner's conviction constitutes an aggravated felony. Courts have utilized the modified categorical approach to allow consideration of a narrow, specified set of court documents that are part of the record of conviction in order to determine

whether a jury was "actually required to find" or the defendant "necessarily admitted" to all the elements of the underlying offense. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602; *Gonzales-Terrazas*, 529 F.3d at 299-300 (Owen J., concurring). The Second, Ninth, and Eleventh Circuits apply this predictable and conventional approach to determine whether an immigrant's conviction satisfies the $10,000 loss requirement of section 1101(a)(43)(M)(i).[19]

In contrast, however, the First, Third, and Fifth Circuits have abandoned the "modified categorical approach" in favor of an ambiguous and novel standard, most recently coined by the Third Circuit as the "tethering" approach. This analysis looks to see whether the "tether" of a loss calculation in excess of $10,000 outside the record of conviction is sufficiently strong for purposes of section 1101(a)(43)(M)(i).[20] *See Nijhawan*, 523 F.3d at 395. The Third Circuit does not advance a useful definition for the "tethered" test. Instead, the court merely held that the "tethered" test was satisfied by the facts of the case, declining to "opine[] as to the nature of the nexus required, or the breadth of the inquiry into the facts." *Id.* As the dissent in *Nijhawan* justifiably argues, however, such an ambiguous and ill-defined standard will wreak havoc on the immigration courts and will undoubtedly result in further litigation seeking to define the parameters of the "tethered" inquiry. *See id.* at 401 n. 15 (Stapleton, dissenting) ("[t]he task of defining the 'tethered' inquiry will fall to future

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[19] *See Kawashima*, 530 F.3d 1111; *Dulal-Whiteway*, 501 F.3d at 128-29; *Obasohan*, 479 F.3d 785.

[20] *See Arguelles-Olivares*, 526 F.3d 171; *Conteh*, 461 F.3d 45.

panels of this Court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.").

The adoption of the Third Circuit's "tethering" approach, as compared to the "modified categorical approach," would make it exponentially more difficult for IJs to determine whether the $10,000 loss amount was satisfied and would invite the introduction of myriad documents not otherwise part of the conventional "record of conviction" to calculate the amount of loss. *See id.* (concerns as to whether IJs would be able to review PSIs or facts in a police report, or look to new testimony or documents introduced at the removal hearing under the "tethered" standard). Indeed, under the "tethering" approach, courts would be permitted to consider evidence from the sentencing phase as well as evidence outside of the underlying record altogether. To permit the consideration of such expansive and unreliable evidence outside the record of conviction would render due process in immigration proceedings a nullity.

III. Courts Should Not Rely Upon Sentencing Documents Such As Restitution Orders And Presentence Investigation Reports Because Those Documents Are Unreliable To Prove The Amount Of Loss Under Section 1101(a)(43)(M)(i).

As Section II, *supra*, makes clear, the categorical approach prohibits reliance on documents such as a restitution order or a presentence investigation report ("PSI") that do not relate to what was necessarily found by a jury or admitted by the defendant as part of the

conviction. However, there is a related and separate question as to whether such documents are reliable in any event.

Circuit courts differ as to whether reliance on a restitution order and a PSI may be relied upon to determine the amount of loss to the victim under section 1101(a)(43)(M)(i). The First, Third, Fifth, and Sixth Circuits have permitted reliance on restitution orders for this very purpose.[21] In contrast, the Second, Seventh, and Eleventh Circuits have generally prohibited reliance on restitution orders because such documents are not only outside the record of conviction, but they have been shown to be unreliable.[22] With respect to the use of PSIs, the Fifth and Seventh Circuits permit reliance on PSIs, at least in certain circumstances,[23] while the First, Second, Seventh, Ninth and Eleventh Circuits prohibit reliance on PSIs.[24]

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[21] *Nijhawan v. Att'y Gen.*, 523 F.3d 387, 389, 396 (3d Cir. 2008); *Graham v. Mukasey*, 519 F.3d 546, 548 (6th Cir. 2008); *Martinez v. Mukasey*, 508 F.3d 255, 257, 259-61 (5th Cir. 2007); *Rivera-Bottzeck v. Gonzales*, 240 F. App'x 272, 277 (10th Cir. 2007) (unreported opinion); *Conteh v. Gonzales*, 462 F.3d at 59; *Chang v. INS*, 307 F.3d 1185, 1190-92 (9th Cir. 2002); *Khalayleh v. INS*, 287 F.3d 978, 979-80 (10th Cir. 2002).

[22] *Dulal-Whiteway*, 501 F.3d at 134; *Obasohan*, 479 F.3d at 789; *Knutsen v. Gonzales*, 429 F.3d 733, 735, 739 (7th Cir. 2005).

[23] *Arguelles-Olivares*, 526 F.3d at 179-80; *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *James v. Gonzales*, 464 F.3d 505, 512 (5th Cir. 2006).

[24] *Manning v. Mukasey*, 270 F. App'x 631, 633 (9th Cir. 2008) (unreported opinion); *Dulal-Whiteway*, 501 F.3d at 129; *Obasohan*, 479 F.3d at 789; *Conteh*, 461 F.3d at 58-59; *Knutsen*, 429 F.3d at 735, 739; *Chang*, 307 F.3d at 1191.

Reliance upon sentencing documents, which are subject to lower burdens of proof and may contain monetary losses attributable to third parties or unconvicted monetary loss, raises significant due process and constitutional concerns for immigrants. This necessitates their disallowance. *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (noting the unfairness of large sentence enhancements based on facts in a PSI proven by a mere preponderance). For the reasons set forth below, *amici* request that this Court adopt a rule, such as that adopted by the Second Circuit in *Dulal-Whiteway*[25], which prohibits reliance on both restitution orders and PSIs, and other similarly unreliable sentencing documents, to determine whether the $10,000 loss amount under section 1101(a)(43)(M)(i) has been met.

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[25] *See Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 128-29 (2d Cir. 2007) (identifying the documents permitted as part of the "record of conviction" as "a charging document (such as an indictment), a signed plea agreement, a verdict or judgment of conviction, a record of the sentence[,] a plea colloquy transcript, and jury instructions").

A. Reliance Upon Restitution Orders To Calculate The Amount Of Loss Under Section 1101(A)(43)(M)(I) Does Not Comport With Due Process And May Result In Unfair Removal Of Long-Time Lawful Permanent Residents Such As The Petitioner With Only One Conviction.

In *Nijhawan*, the Third Circuit noted that a restitution order, which by its nature is neither found by a jury nor specifically pleaded to by a defendant, could be considered in determining whether the $10,000 loss amount had been satisfied. *See Nijhawan*, 523 F.3d at 394. However, it is fundamentally unfair to rely upon a restitution order to calculate the loss amount. The restitution order does not represent what was established by the conviction, and relying on it permits the government to supplant its burden of proof of establishing by "clear and convincing evidence" an immigrant's removability through a document subject to the lower "preponderance of the evidence" standard. Furthermore, the restitution amount may be based upon losses not attributable to the actual defendant and conduct unrelated to the charges to which the defendant pleaded guilty or to which the defendant was convicted.

1. The Government's Burden To Establish Removability By Clear And Convincing Evidence Cannot Be Satisfied By Relying Upon Restitution Orders That Are Subject To A Preponderance Of The Evidence Standard.

Administrative proceedings in which an immigrant may be ordered deported from the United States involve the potential deprivation of a significant liberty interest and must be conducted according to the principles of fundamental fairness and substantial justice. *See Landon v. Plasencia*, 459 U.S. 21, 34- 35 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.").

The government has asserted that, consistent with the BIA decision *In re Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007), courts should be permitted to consider *any* evidence (including restitution orders) when determining whether an immigrant's conviction satisfies one of the aggravated felony definitions. To do so, however, fundamentally undermines the fairness of immigration proceedings because it permits the government to rely upon sentencing documents that are subject to a lower burden of proof in order to establish an immigrant's removability.

Federal law provides that the burden of proof for restitution orders is preponderance of the evidence.[26] 18 U.S.C. § 3664(e); *see United States v. Danford*, 435 F.3d 682, 689 (7th Cir. 2006) ("[r]estitution is determined by the judge using the lower preponderance of the evidence standard."). In comparison, however, the INA imposes a heightened burden of proof in removal proceedings, requiring the government to establish by *clear and convincing evidence* that the immigrant is deportable. 8 U.S.C. § 1229a(c)(3)(A); 18 U.S.C. § 3664(e). In doing so, the INA codifies this Court's decision in *Woodby v. INS*, which rejected the "mere preponderance of the evidence" burden of proof in light of the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where [he or she] often has no contemporary identification."[27] 385 U.S. 276, 284-86 (1966). Undoubtedly with these concerns in mind, Congress took pains to identify the classes of documents and records which may be relied upon by the immigration courts as proof of a criminal conviction. 8 U.S.C. § 1229a(c)(3)(B) (listing documents and records that "shall constitute proof of a criminal conviction"). These sources of evidence are "substantially similar to those

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[26] The procedure for ordering restitution under both the Victim and Witness Protection Act of 1982 ("VWPA") and the Mandatory Victims Restitution Act ("MVRA") is outlined in 18 U.S.C. §§ 3663(d), 3664, and 3663A(d).

[27] In *Woodby v. INS*, this Court decreed that the burden of proof in removal proceedings is that of "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby v. INS*, 385 U.S. at 284-86.

described as within the bounds of the inquiry in *Taylor* and *Shepard*." *Kawashima*, 530 F.3d at 1122 n.3. The reasons for such are clear: Reliance on restitution orders and other sentencing documents to establish the loss amount under section 1101(a)(43)(M)(i) would undermine the fundamental fairness inherent in due process because aggravated felony determinations would be based upon findings that were not "actually found" by or a jury or "necessarily admitted" by the defendant in the criminal case below – precisely the type of information that may conflict with an immigrant's agreed upon plea bargain or convicted charge.

2. The Amount Of Restitution Ordered May Exceed The Actual Loss To The Victims And May Include Restitution For Criminal Conduct And Losses Attributable To Co-Conspirators.

In addition to the irreconcilable burdens of proof, courts should be prohibited from relying on restitution orders to determine the loss amount under section 1101(a)(43)(M)(i) because defendants may be ordered to pay restitution far in excess of the loss to which he or she pleaded, or of which he or she was found guilty. For purposes of restitution, federal law broadly defines the term "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Courts have interpreted this broad language to permit, in conspiracy cases, orders

for restitution for all losses caused as a result of the conspiracy, whether the defendant was convicted of each of the underlying substantive offenses or not. *See United States v. Collins*, 209 F.3d 1, 3 (1st Cir. 1999); *see also United States v. Plumley*, 993 F.2d 1140, 1142 n. 2 (4th Cir. 1993) (amendments do not "usurp[] the settled principle that a criminal defendant who participates in a conspiracy is liable in restitution for all losses flowing from that conspiracy"); *United States v. Lewis*, 104 F.3d 690, 693 (5th Cir. 1996) (defendant responsible for entire amount of loss caused by conspiracy regardless of whether he personally participated in each illegal transaction).

Further, in conspiracy cases where more than one defendant contributed to the loss of a victim, courts have wide latitude to attribute restitution to either specific defendants or jointly and severally among all co-defendants. *See* 18 U.S.C. § 3664(h); *United States v. Boyd*, 222 F.3d 47, 50 (2d Cir. 2000). In do doing, courts may even consider "uncharged or acquitted counts." *Boyd*, 222 F.3d at 51. Moreover, these statutes allow a sentencing court to grant restitution even to alleged victims not named in the indictment. *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996).

Under these circumstances, a restitution order would be wholly unreliable for purposes of establishing the amount of loss. Indeed, reliance upon a restitution order that may establish a loss amount based upon conduct attributable to other co-defendants would run afoul of the requirement that courts "may rely only upon facts to which a defendant *actually and necessarily* pleaded in order to establish the elements of the offense,

as indicated by a charging document, written plea agreement, or plea colloquy transcript." *Dulal-Whiteway*, 501 F.3d at 131 (emphasis added); *see also Shepard*, 544 U.S. at 20 ("With such material in a pleaded case, a later court could generally tell whether the plea had 'necessarily' rested on the fact identifying the [prior crime] as [the enumerated offense.]").

Consequently, for an individual pleading guilty – even one who is able to specify his or her actual loss amount in the plea agreement – the amount of restitution ordered will likely not be limited to the actual losses suffered in connection with plea or a conviction. In fact, restitution orders and other sentencing documents often go beyond the conviction in calculating loss amounts, as demonstrated in the following cases where indictments addressed specific loss amounts.

- Steve Chang has been an LPR since 1975 when he moved from South Korea to the United States with his family. Mr. Chang was indicted on fourteen counts of bank fraud for allegedly passing bad checks. He pleaded guilty to only one of the counts, which charged him with cashing a $605.30 counterfeit check at a grocery store. The plea agreement explicitly stated the "exact loss to the victim" for the lone offense to which he pleaded guilty was $605.30. The plea agreement also stated that Mr. Chang and the government agreed that he would make restitution "in excess of the specific loss caused by the check" in the count to which he pleaded guilty, within a range of $20,000 to $40,000. Pursuant to the plea, Mr. Chang was sentenced

to eight months and ordered to pay $32,628.67 in restitution. Subsequently, the INS initiated removal proceedings. Relying on the restitution order, the IJ held that Mr. Chang's conviction by guilty plea qualified as an aggravated felony even though the restitution amount included "numerous other alleged fraudulent transactions" to which he did not plead guilty, but for which he agreed to make restitution. In doing so, the IJ relied on a restitution amount that did not reflect the loss to the victim from the convicted conduct and was instead bargained for by Mr. Chang in exchange for the government's agreement to drop the remaining counts. On appeal, the Ninth Circuit held that reliance on the restitution stipulation for determining the amount of loss was improper, and therefore Mr. Chang was not an aggravated felon. Mr. Chang's case illustrates criminal courts will order restitution for counts dropped as part of a plea agreement and then IJs will rely on the restitution order to arrive at a loss to the victim(s) that is greater than the actual loss caused by the offense to which the defendant pleaded guilty. Had the approach of the IJ and BIA been followed, Mr. Chang – a long-time lawful permanent resident who had never returned to South Korea since he left, did not speak or understand Korean, and received his entire education in the U.S. public school system – would have been deported for having committed an aggravated felony even though

the actual loss to the victim fell "about $9,400 shy of qualifying as an aggravated felony."[28]

- Jon Knusten was admitted to the United States as an LPR in 1957. Mr. Knutsen was indicted for two counts of bank fraud alleging a scheme to defraud his employer-bank. Mr. Knutsen pleaded guilty to one count, which alleged a total loss of $7,350. A second count, accusing Mr. Knutsen of orchestrating a check-kiting scheme, was dismissed as part of a plea. The judgment order stated a total amount of restitution of $22,480. The Seventh Circuit held that the losses related to "relevant conduct" that Mr. Knutsen stipulated to should not be considered in determining whether the losses to the victim from the offense of conviction exceeded $10,000. Since the plea agreement "plainly documented" the loss for the offense of conviction as $7,350, a monetary loss amount insufficient to find Mr. Knutsen had committed an aggravated felony, the court vacated the IJ's order of removal.[29] *Knusten* illustrates restitution orders frequently order restitution amounts based at least in part on conduct for which the defendant has not been convicted.

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[28] *Chang*, 307 F.3d at 1187-90; Brief of Appellant at 1-2, *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (No. 01-35626), 2001 WL 34091163, at *1-2.

[29] *Id.* at 735, 739-40.

- Luz Elena Lopez De Rowley has been an LPR since 1970, when she married her U.S. citizen husband. In March 2000, Ms. Rowley pleaded guilty to conspiracy to commit mail fraud by submitting false claims to her insurance company. The indictment alleged three fraudulent checks, one of which was for less than $10,000.[30] Several of the counts were dismissed as part of her plea, and she was ultimately sentenced to serve 12 months in prison and, along with her co-conspirators, ordered to pay restitution in the amount of $55,808.42.[31] Relying on the restitution order and the indictment, the IJ found that Mrs. Rowley's conviction by guilty plea qualified as an aggravated felony. Based on this holding, the IJ ordered her deportation despite her status as an LPR for over 30 years with no prior criminal conviction. On appeal, the Second Circuit reiterated the court's prohibition on relying on restitution orders under its *Dulal-Whiteway* standard and held that Mrs. Rowley was not an aggravated felon. Since the government did not submit the plea allocution at her immigration hearing, the court held it was not possible to determine whether she had "actually and necessarily pleaded" to a loss greater than $10,000. Mrs. Rowley would have had a different outcome in her case under the Third Circuit's approach, which permits the use of restitution orders to establish loss.

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[30] *Lopez-De Rowley v. INS*, 253 F. App'x 62, 64 (2d Cir. 2007).

[31] Appellant Brief at 4, *Lopez-De Rowley v. INS*, 253 F. App'x 62 (2d Cir. 2007) (No. 01-4172-AG), 2006 WL 6106168, at *4.

As these examples illustrate, in cases where the conviction record specifies monetary loss attributable to different counts in an indictment, the modified categorical approach is capable of distinguishing between cases in which the loss is under, or over, $10,000. Thus, there is no need for a "tethering" approach or any reference to the restitution order. To the contrary, as these cases illustrate, the restitution order clouds the underlying question of the loss that is attributable to the conduct for which the individual was convicted, and immigrants who plead to a specific loss amount in the plea agreement expecting that the loss amount would place that conviction outside the scope of an aggravated felony may nevertheless face deportation.

Restitution orders present the same problems when the counts in the indictment to which the defendant entered a plea do not include specific dollar amounts connected to the charged fraudulent activity. As illustrated below, the use of a restitution order places the immigrant in the impossible position of being presumed to have caused a loss for which the person was not convicted and which may have been computed based on unreliable evidence.

- Spencer Dulal-Whiteway is a citizen of Trinidad and Tobago who was lawfully admitted to the United States in 1996. Mr. Dulal resided in New York with his mother, step-father, and brother. He was enrolled in college in New York and had been employed performing computer related services.[32] Nearly 5 years after being admitted

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[32] Petitioner's Brief in Support of Petition for Review at 7, *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007) (No. 05-3098-ag), 2006 WL 5737398, at *7.

> to the United States, Mr. Dulal was indicted for using unauthorized access devices to obtain items of value of $1,000 or more and with making false statements in connection with the acquisition of a firearm. Mr. Dulal pleaded guilty to these two matters. The Probation Office thereafter prepared a PSI and recommended Mr. Dulal pay $20,824.09 in restitution The court issued a restitution order establishing the loss amount at $20,824.09. Thereafter, the INS began removal proceedings, alleging that he had been convicted of making false statements to acquire a firearm and that he had been convicted of an offense involving fraud or deceit where loss to the victims exceeded $10,000. The IJ found Mr. Dulal's firearm offense rendered him removable under the INA. Additionally, the IJ found Mr. Dulal removable for his fraud conviction after consulting the PSI and the restitution order – documents which the IJ stated established a loss over $20,000. On apeal, the Second Circuit found that Mr. Dulal had only been alleged of causing a loss greater than $1,000 and found no evidence in the record of a plea allocution or written plea agreement indicating that he admitted to causing a loss exceeding $10,000. [33]

Dulal-Whiteway illustrates the terrible unfairness of permitting courts to rely on the restitution orders to calculate the amount of monetary loss. Unlike *Chang*, *Knutsen* and *Lopez De Rowley*, the criminal record of conviction lacks the evidence to show that the restitution order goes beyond the charges to which Mr. Dulal pleaded.

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[33] *Dulal-Whiteway*, 501 F.3d at 118-20, 123-34.

Had the IJ been permitted to go beyond the record of conviction, Mr. Dulal would have faced deportation even though the charges to which he pled only indicated a loss greater than $1,000. As *Dulal-Whiteway* shows, restitution orders are often mere restatements of PSIs, which involve allegations of fact that may either explicitly diverge from the indicted amount, or involve an underlying indictment that does not have the easy check-by-check counts that allow an IJ to determine whether the loss truly involves indicted and convicted amounts. *See* Section III.B, *infra*. Limiting review to only the record of conviction documents specified in *Taylor* and *Shepard* alleviates these concerns by focusing only on what was actually established by the conviction.

B. Reliance Upon Presentence Investigation Reports To Calculate The Amount Of Loss Under Section 1101(A)(43)(M)(I) Similarly Fails To Comport With Due Process And May Also Result In Unfair Removal Of Long-Time Lawful Permanent Residents.

1. The Government's Burden To Establish Removability By Clear And Convincing Evidence Cannot Be Satisfied By Relying Upon Presentence Investigation Reports.

Unlike restitution orders, the facts contained in a PSI do not represent court findings unless the PSI is challenged. Even when challenged, the facts in the PSI need only be proven by a preponderance of the evidence — a lower standard than the heightened clear and convincing evidence standard required of the government in establishing an immigrant's removability.

See United States v. Greene, 41 F.3d 383, 386 (8th Cir. 1994). Thus, to permit the government to rely upon facts contained in a PSI to establish whether the $10,000 loss amount had been satisfied would be fundamentally unfair as it would allow the government to circumvent its statutory burden of proof in immigration proceedings. The Eleventh Circuit recently held as much in *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007). There, the court ruled that it was error for the IJ to rely on the restitution amount recommended in the PSI to establish that the loss to the victims exceeded $10,000 under section 1101(a)(43)(M)(i) because the factual findings were based on allegations in the PSI and were made under the preponderance rather than the clear and convincing evidence standard. *See id.* at 791. Therefore, reliance on a PSI to determine the monetary loss amount should be prohibited.

2. Information Contained Within A Presentence Investigation Report May Include Loss Amounts In Excess Of The Actual Loss To The Victims To Which The Defendant Pleaded Or Was Found Guilty.

As with restitution orders, the use of PSIs to establish the loss amount under section 1101(a)(43)(M)(i) should be prohibited because loss amounts in the PSI may be based on conduct unrelated to the defendant as well as loss amounts far exceeding the loss to which the defendant pleaded or was found guilty. Under the U.S. Sentencing Guidelines, sentencing courts – including those calculating loss amount in fraud cases – may consider not only the conduct for which the defendant

was convicted but also "relevant conduct."[34] *See United States v. Boesen*, 541 F.3d 838, 850-51 (8th Cir. 2008) (affirming consideration of relevant conduct in calculating loss amount). It is well-settled that such "relevant conduct" may include conduct for which the defendant was never charged or was *acquitted*,[35] previously untried conduct proven by a mere preponderance,[36] and in at least one circuit, even losses no longer prosecutable because they fall outside the statute of limitations.[37] Thus, sentencing courts are allowed to – and in fact do – rely on unconvicted "relevant" conduct routinely contained in a PSI in making sentencing determinations.

Further, the scope of sentencing inquiry – and therefore of the PSI – is largely unlimited. *United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."). PSIs may even contain hearsay. *Gregg v. United States*, 394 U.S. 489, 492 (1969) ("There are no formal limitations

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[34] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004) (defining relevant conduct).

[35] *See United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (holding that sentencing courts can consider acquitted conduct).

[36] *United States v. Bras*, 483 F.3d 103, 107-08 (D.C. Cir. 2007) (holding that reliance on acquitted conduct proven by a preponderance compelled permitting reliance on previously untried conduct).

[37] *Obasohan*, 479 F.3d at 790 (citations omitted).

on [PSI's] contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged.");

Consequently, when an IJ relies on a PSI in determining whether the loss to the victim exceeds $10,000, it may be unclear whether that amount includes loss attributable to uncharged or acquitted conduct. Ultimately, an immigrant may be ordered deported even though their offenses of conviction did not actually meet the $10,000 loss threshold. As the below cases demonstrate, this unjust result will subject immigrants who pleaded guilty to, or were convicted of, conduct causing actual loss under the $10,000 threshold to the draconian consequence of deportation. Many of these immigrants are long-term residents of the United States with little or no connection with their native countries.

- Etetim James, a native and citizen of Nigeria, was admitted to the United States in 1986 and became an LPR in 1987. In 2000, Mr. James pleaded guilty to one count of aiding and abetting bank fraud (18 U.S.C. §§ 2 and 1344) involving a transaction with a credit union in the amount of $9,500. The judgment of conviction ordered Mr. James to serve a 24 month sentence and to pay restitution in the amount of $129,066,60. Upon completion of his sentence, Mr. James was charged with removability under section 1101(a)(43)(M)(i). At his removal hearing, the IJ terminated removal proceedings on the grounds that the government had failed to demonstrate that the loss to the victims exceeded $10,000 since he pleaded guilty to a

single count of only $9,500. On appeal, the Fifth Circuit vacated the IJ's order after concluding that the amount of restitution Mr. James owed, based upon conduct included in the indictment, PSI, and judgment of conviction, constituted the proper amount to use in determining the amount of loss to the victims. The court looked to the PSI which documented an intended loss totaling more than $186,470. The court held that Mr. James had committed an aggravated felony.[38]

- Julius Obasohan, an LPR, was indicted on one count of conspiracy to produce, use and traffic in counterfeit access devices by obtaining a third-party's credit card. Mr. Obasohan pled guilty to the sole count of conspiracy in the indictment. Mr. Obasohan did not admit to any loss in his plea agreement. During the plea colloquy, the government stated "there was no loss because the new credit card was being sent to the recipient," and the court stated the amount of loss was zero. However, the subsequently-prepared PSI stated that "further investigation had uncovered Mr. Obasohan's fraudulent use of other credit cards which had caused losses in excess of $37,000." The PSI recommended restitution of $37,000. The court sentenced Mr. Obasohan to 41 months and ordered $37,000 in restitution as recommended in the PSI. DHS initiated removal proceedings and the IJ, relying upon the restitution order, found that Mr. Obasohan

[38] *James*, 464 F.3d at 506-12.

caused loss to the victim in excess of $10,000, and was thus an aggravated felon. The Eleventh Circuit held that that IJ's reliance on the amounts contained in the restitution order to establish loss to the victim was improper. The restitution was not based on the conspiracy charge to which Mr. Obasohan pleaded guilty. Instead, the order was based on "*additional* conduct" alleged "only in the PSI," which Mr. Obasohan denied. The court noted that the INA "does not authorize removal on the basis of the relevant conduct that may be considered at sentencing."[39] Accordingly, the court remanded the matter to the BIA. Had the IJ been permitted to rely on the restitution amount recommended in the PSI, Mr. Obasohan – a *pro se* habeas petitioner and LPR – would have been deported despite the fact that the government and the court agreed there was no loss to the victim from the offense of conviction.[40]

- Joel Arguelles-Olivares immigrated to the United States over 30 years ago and has been an LPR since 1977. Mr. Olivares' mother, two sisters,. and two brothers are all naturalized citizens. Mr. Olivares married in 1993 and has two U.S. citizen children. Since 1978, Mr. Olivares has been a self-employed masonry contractor who has been financially successful in that capacity and regularly employs a number of individuals. In 2003, Mr. Olivares was charged

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[39] *Obasohan*, 479 F.3d at 788.

[40] *See id.* at 786-90.

> and pleaded guilty to a single count of filing a false income tax return. Mr. Olivares was sentenced to 21 months imprisonment but was not fined or ordered to pay any restitution. Following his conviction, DHS initiated removal proceedings alleging Mr. Olivares had been convicted of an aggravated felony under section 1101(a)(43)(M)(i). Mr. Olivares asserted there was no evidence that his conviction involved a loss exceeding $10,000 because the judgment of conviction did not mention the amount of actual loss. Mr. Olivares further argued it was improper for the IJ to rely on the PSI as evidence of the amount of loss. The only document in the record that provided any indication of the amount Mr. Olivares underpaid his taxes was the PSI. Mr. Olivares argued that the PSI must be excluded under the "categorical approach" of examining prior convictions. The court calculated the loss based upon a review of the PSI which specified the total amount of loss to be $248,335 for the years 1996-2000. The court found that the offense of conviction was an aggravated felony.[41] However, as the dissenting judge emphasized, PSIs often include unconvicted loss.

Because PSIs may base an amount of loss upon losses which may be attributable to other co-defendants as well as take into account uncharged and/or acquitted conduct in determining loss, PSIs are an unreliable source of information upon which to base a loss amount under section 1101(a)(43)(M)(i). Accordingly, its use should be disallowed for this purpose.

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[41] *Arguelles-Olivares*, 526 F.3d at172, 175-80.

CONCLUSION

For the reasons set forth above, *amici* respectfully submit that the judgment of the court of appeals should be reversed.

Respectfully submitted,

VINCENT A. ENG
Counsel of Record
KAREN K. NARASAKI
TUYET DUONG
ASIAN AMERICAN
JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
(202) 296-2300

DAVID A. KETTEL
JACKIE M. JOSEPH
DONALD W. YOO
JOSHUA D. BRITTINGHAM
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(310) 229-9900

Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici Curiae*

Asian American Justice Center ("AAJC")
AAJC is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings. AAJC has testified before Congress numerous times and has long worked with the executive branch on policy solutions that would ensure that the government conducts immigration proceedings that comport with principles of due process and fairness.

The Asian Pacific American Legal Center of Southern California ("APALC")
APALC was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include

workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC employs policy advocacy and case work to represent the interests and due process rights of individuals who could be repatriated and removed from the country. It is in this interest that we participate with our affiliate AAJC on this brief.

Asian American Institute ("AAI")

AAI is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. Because AAI strives to give a human face to the immigration-related challenges that Asian Americans experience, AAI has an important interest in *Nijhawan v. Holder*. Applying inconsistent and unduly harsh standards in removal proceedings, as the Third Circuit did against Nijhawan, is unfair to immigrants and their families and violates applicable principles of law.

The Asian Law Alliance ("ALA")

ALA, founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on

immigration issues and has represented immigrants with criminal convictions before U.S. Citizenship and Immigration Services.

The Asian Law Caucus ("ALC")

ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on the importance of diversity programs. The ALC has a history of representing individuals in removal proceedings, particularly juveniles. ALC has long promoted principles of due process and fairness in immigration proceedings, especially where defendants are vulnerable and without language skills and resources to navigate our court systems. ALC is affiliated with the AAJC.

Boat People SOS ("BPSOS")

BPSOS is a national Vietnamese-American organization with 13 branch offices nationwide serving some 10,000 Vietnamese refugees and immigrants each year. In 1990, BPSOS established Legal Assistance for Vietnamese Asylum Seekers ("LAVAS"), providing legal aid and conducting advocacy with regard to refugee protection. BPSOS has since expanded its domestic operation to include a large array of human services to Vietnamese refugees and immigrants. In our longstanding work with

citizenship applicants, VAWA applicants, and refugees we have assisted long term residents of this country who are risk for removal due to one crime and often lack adequate representation and knowledge of our legal system. In our long term work in immigration and international human rights, we recognize the need for strong due process safeguards in our country, and it is because of this interest that we participate in this brief.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center")

The Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting due process and fairness in the courts of our country, especially when it involves the removal of individuals with extensive ties to the United States. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Appendix

Hmong National Development, Inc. ("HND")
HND is a national, nonprofit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society. Historically, we have provided advocacy on behalf of Hmong refugees who are disadvantaged in removal proceedings due to lack of resources and language abilities.

The National Korean American Service & Education Consortium ("NAKASEC")
NAKASEC was founded as a consortium in 1994 by local community centers that realized that only by coming together can we build and contribute to a national movement for civil rights. Our mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society.

National Asian Pacific American Bar Association ("NAPABA")
NAPABA is the national association of Asian Pacific American attorneys, judges, law professors and law students. NAPABA represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels

of government. Since NAPABA's inception in 1988, it has promoted justice, equity and opportunity for Asian Pacific Americans, as the national voice for Asian Pacific Americans in the legal profession. These efforts have included civil rights advocacy on various fronts. NAPABA joins *amici* to preserve due process in immigration proceedings, where fundamental rights of many Asian Pacific Americans are at stake.

National Asian Pacific American Women's Forum ("NAPAWF")

NAPAWF is the only national, multi-issue APA women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for APA women and girls. We have a history of advocating for the rights of immigrant women and girls given their particular vulnerabilities within the immigration system, especially due to their economic status, lack of education, resources, and language capacities.

The National Asian American Pacific Islander Mental Health Association ("NAAPIMHA")

NAAPIMHA is a non-profit organization that was developed to address the mental health needs of Asian Americans, Native Hawaiians and Pacific Islanders. NAAPIMHA is concerned with the basis for removal in the *Nijhawan v. Holder* case, particularly since Nijhawan has two children who are U.S. citizens. In such cases, deportation is an extreme sentence that impacts not only the individual, but places unfair burden on the family and in essence also punishes family members who are innocent victims.

Appendix

National Council of La Raza ("NCLR")
NCLR the largest national Hispanic civil rights and advocacy organization in the U.S., works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, D.C. To achieve its mission, NCLR conducts applied research, policy analysis and advocacy providing a Latino perspective. NCLR has played a key role in advocating for fair immigration policies for many years. Approximately 40% of the country's 45 million Hispanics are foreign-born and since many Latinos live in mixed-status families, the vast majority of our nation's Latinos are directly affected by immigration policy. NCLR files this brief to present the implications of removal of Latino lawful permanent residents who have established ties to their communities.

Organization of Chinese Americans ("OCA")
OCA is a national organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. Founded in 1973 as the Organization of Chinese Americans, OCA aims to embrace the hopes and aspirations Asian Pacific Americans in the United States. OCA conducts advocacy and education throughout its 80 chapters. OCA has long advocated for the civil rights of Asian Pacific Americans, and as such, has a strong interest in promoting due process in all of our courts.

Appendix

Sikh American Legal Defense and Education Fund ("SALDEF")
Founded in 1996, SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Its mission is to protect and promote the civil rights of Sikh Americans and ensure a fostering environment for future generations of Sikh Americans through advocacy and education. As a faith-based civil rights organization, SALDEF favors vigorous defense of due process principles in proceedings that result in permanent removal of individuals with families and children.

South Asian Americans Leading Together ("SAALT")
SAALT is a national organization dedicated to fostering civic and political engagement for the South Asian community in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development. SAALT has been a leading voice for just and humane immigration reform for the South Asian community through advocacy with Congressional legislators and government agencies. SAALT joins in filing this amicus brief to ensure the protection of due process rights of immigrants in removal proceedings, particularly for lawful permanent residents with established ties to the United States.

Southeast Asia Resource Action Center ("SEARAC")
SEARAC is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building and

community empowerment. Established in 1979 to assist with the resettlement of the largest resettlement of refugees to the U.S. from Southeast Asia, SEARAC continues to be a leading advocate for these communities. SEARAC has been a strong advocate on immigrant rights, particularly around due process and the deportation of lawful permanent residents, many of whom arrived in the U.S. as refugees and have been longtime residents. Through our work on due process and deportation issues with congressional and federal decision makers and with Southeast Asian American families who are directly affected we recognize the unfair and detrimental impact our current policies have in communities across the U.S. As such, we support the AAJC in their submission of this brief to highlight the impact of deportation on lawful permanent residents.

AMICUS CURIAE BRIEF

No. 08-495

Supreme Court, U.S.
FILED
MAR 4 - 2009
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IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Joshua L. Dratel
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
JOSHUA L. DRATEL, P.C.
2 Wall Street, Third Floor
New York, NY 10005
(212) 732-0707

Iris E. Bennett*
Anjan Choudhury
Michael A. Hoffman
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000

David A. Newman
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

*Counsel of Record

Attorneys for Amicus Curiae

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide, and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the statutory interpretation of criminal laws. In furtherance of this and its other objectives, NACDL files approximately 50 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision below abandons the well-settled categorical approach for determining whether a prior conviction constitutes an aggravated felony. This decision raises significant questions regarding the Sixth Amendment and Due Process rights of criminal defendants that our members represent, as well as

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for a party authored any part of the brief, and no person or entity other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief.

policy concerns regarding the ability of our members to counsel their clients about the consequences of certain criminal convictions.

SUMMARY OF ARGUMENT

In recent years, this Court has left little doubt that interpretive issues in a statute that has applications in multiple contexts should be resolved consistently across applications. *Clark v. Martinez*, 543 U.S. 371 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This Court has held that, when faced with multiple plausible interpretations, a need for a limiting construction in one context mandates the same construction in other contexts. Whether to avoid raising constitutional doubt or to provide fair warning under the rule of lenity, this rule of consistent interpretation ensures that congressional intent is respected.

These principles apply with full force to the instant case. Pursuant to 8 U.S.C. § 1101(a)(43)(M)(i), an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony. While the Petitioner's case arises from application of the provision in immigration removal proceedings, the provision has application in the criminal sentencing context as well. Specifically, a criminal defendant facing illegal re-entry charges is subject to an increased maximum penalty of twenty years incarceration if deemed an aggravated felon. 8 U.S.C. § 1326(b)(2). Thus, Section 1101(a)(43)(M)(i) is a classic example of a dual use statute that

straddles the intersection between criminal and immigration law.

The criminal application of the provision compels a consistent reading of Section 1101(a)(43)(M)(i) that conforms to this Court's adherence to a categorical framework for determining whether an individual has been "convicted" of a designated prior criminal offense for purposes of a sentence enhancement. *See Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). The approach adopted by the Third Circuit and advocated by the Government, by dispensing with the *Taylor/Shepard* model, raises grave Sixth Amendment and Due Process questions by inviting a sweeping collateral inquiry into nonconvicted conduct. The rule of constitutional avoidance requires rejection of this approach. The rule of lenity, also applicable here, further rejects this approach. By contrast, the *Taylor/Shepard* approach to Section 1101(a)(43)(M)(i) avoids these problems and provides clarity to actors in the criminal justice system.

The Third Circuit and Government's approaches are inconsistent with this Court's clear instruction regarding the interpretation of dual use statutes. The concerns these approaches would raise with respect to the Sixth and Fourteenth Amendments, the rule of lenity, and the fair administration of the criminal justice system are manifold. Accordingly, the Third Circuit's decision should be reversed.

ARGUMENT

I. The "Aggravated Felony" Fraud Definitional Provision Must be Construed Consistently Across Immigration and Criminal Contexts and in Accordance with *Taylor/Shepard*.

A. Section 1101(a)(43)(M)(i) has criminal as well as immigration consequences.

Like other aggravated felony definitional provisions, Section 1101(a)(43)(M)(i) serves dual purposes. Section 1101(a)(43)M)(i) provides that an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an "aggravated felony." In the immigration context, conviction of an aggravated felony has numerous severe consequences. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii); *see also id.* § 1229b(a)(3), (b)(1)(C) (cancellation of removal unavailable); *id.* § 1158(b)(2)(A)(ii), (b)(2)(B)(i) (asylum unavailable). A prior conviction for an aggravated felony also has severe criminal consequences. The maximum sentence for illegal re-entry after a prior deportation is increased from 2 years to 20 years for any noncitizen "whose removal was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2).

Thus, Section 1101(a)(43)(M)(i) is located at the intersection of immigration law and criminal law. Congress could have drafted two distinct aggravated felony provisions, one applicable to immigration law and the other to criminal law. Congress chose not to take that course. Instead, Congress enacted a single

provision, Section 1101(a)(43)(M)(i), that serves a dual purpose. The provision must be given a uniform meaning that avoids constitutional problems in all applications.

B. The statutory interpretation canons set forward in *Leocal v. Ashcroft* and *Clark v. Martinez* require a consistent reading of Section 1101(a)(43)(M)(i).

Petitioner should prevail under the plain language of the statute, which requires that an individual have been "convicted of" an aggravated felony in order to be subject to mandatory deportation. 8 U.S.C. § 1227(a)(2)(A)(iii). Similarly, the illegal re-entry sentence enhancement statute requires that re-entry occur subsequent to "a conviction for" an aggravated felony. 8 U.S.C. § 1326(b)(2). It is well-settled that the *Taylor/Shepard* analysis applies to determine the nature of a prior conviction. To hold, as the Third Circuit did, that evidence of the loss amount need only be "tethered" to the conviction defies the express textual requirement that the noncitizen have been "convicted of" the aggravated felony.[2] *Nijhawan v. Att'y Gen. of the U.S.*, 523 F.3d 387, 396 (3d Cir. 2008).

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[2] The Government analogizes loss amount to provisions that require imposition of certain sentence terms to trigger aggravated felony definitions. *See In re Babaisakov*, 24 I. & N. Dec. 306, 314 (BIA 2007). Yet, those provisions on their face turn on the sentence imposed, and not the facts – such as loss amount – necessary for conviction.

Assuming *arguendo* that the statute's plain language does not compel adherence to the *Taylor/Shepard* approach, such an approach still remains among the provision's most plausible interpretations. Where the Court must select among facially plausible constructions of a statute, it initially "must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 380-81.

Leocal presented a question similar to that posed in the instant case in important respects. The petitioner had been ordered deported as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and the question was whether his conviction constituted an "aggravated felony." *Leocal*, 543 U.S. at 7-8. The Court recognized that the definitional provision had been "incorporated into a variety of statutory provisions, both criminal and noncriminal." *Id.* at 7. Consequently, the Court explained:

> we [are] constrained to interpret any ambiguity in the statute in petitioner's favor. Although we here deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 12 n.8; *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (applying the rule of lenity in civil tax setting because statute had criminal applications).

Just one year later, *Clark* provided further guidance on the interpretation of dual use statutes. *Clark* considered and rejected the notion that an immigration detention provision could have different meanings when applied to different sets of noncitizens. Such an approach "would be to invent a statute rather than interpret it." 543 U.S. at 378.

Clark held that, in determining the scope of a statute with applications in multiple contexts, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 380. *Clark* made clear that the interpretive principle it enunciated honors congressional intent. The constitutional avoidance doctrine is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts," thereby "giving effect to congressional intent, not . . . subverting it." *Id.* at 381-82. Finally, where constitutional doubt would arise in one application of a statute with multiple applications, the Court roundly rejected the use of inconsistent

interpretations between applications: such a rule would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.

Any doubt remaining after *Clark* as to whether a statute with both criminal and immigration applications must be interpreted consistently across the two contexts was resolved by a third case in as many years, *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* concerned whether an offense that is a felony under state law but a misdemeanor under federal law qualifies as a "drug trafficking" aggravated felony, thereby triggering mandatory deportation. At the same time that the Court granted certiorari in *Lopez*, it also did so in *Toledo-Flores v. United States*, 547 U.S. 1054 (2006), *cert. dismissed*, 549 U.S. 69 (2006), an illegal re-entry sentencing case raising the same question as *Lopez* with respect to the scope of the drug trafficking aggravated felony definition.

Toledo-Flores was subsequently dismissed as moot, but this Court clearly intended *Lopez*'s holding to apply consistently across the immigration and criminal contexts. *Lopez* cited and abrogated a series of both removal and sentencing cases that had reached a contrary conclusion as to the scope of the aggravated felony provision at issue. *Lopez*, 549 U.S. at 52 n.3. Courts after *Lopez* have recognized the decision's applicability to both criminal and immigration cases. *United States v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir. 2007) ("*Lopez*

ineluctably applies with equal force to immigration and criminal cases"), *cert. denied*, 549 U.S. 1291 (2007); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1216 (9th Cir. 2007) ("it is beyond dispute that *Lopez* applies in both criminal sentencing and immigration matters").

The Third Circuit justified its decision as "consistent with the different evidentiary standards used in criminal sentencing, and immigration proceedings, respectively." *Nijhawan*, 523 F.3d at 398. The Court asserted that if the *Taylor/Shepard* analysis were required in the immigration context then this would require removal to be based on proof beyond a reasonable doubt, rather than by the immigration standard of clear and convincing evidence. *Id.* at 398. This reasoning, however, ignores the teachings of *Clark* and *Leocal*: that statutory language should be interpreted consistently across different applications and, where one application requires a limiting construction due to constitutional concerns, the "lowest common denominator" governs.[3] If application in the sentence enhancement context requires that only evidence proven beyond a reasonable doubt be considered, then *Clark* and *Leocal* teach that this

[3] The Court also acknowledged that the *Taylor* rule governs the fraud element, which means this element must have been proven beyond a reasonable doubt. *Nijhawan*, 523 F.3d at 392-93.

limiting construction shall also apply in the removal context.[4]

C. The *Taylor/Shepard* categorical approach governs whether an individual has been "convicted of" a section 1101(a)(43)(M)(i) fraud offense whether for immigration or criminal purposes.

It is well-established that *Taylor/Shepard* governs whether an individual has been convicted of a prior offense that would trigger a sentencing enhancement. *See Shepard*, 544 U.S. at 19, 26; *Taylor*, 495 U.S. at 600-02. The *Taylor/Shepard* approach applies to determine whether the maximum sentence enhancement for illegal re-entry is triggered under 8 U.S.C. § 1326(b)(2) no less than to any other statutory sentencing enhancement. *See, e.g., United States v. Lopez-Zepeda*, 466 F.3d 651, 652-53 (8th Cir. 2006); *United States v. Hernandez-Neave*, 291 F.3d 296, 298-99 (5th Cir. 2001). Since 8 U.S.C. § 1101(a)(43) defines an aggravated felony under § 1326(b)(2) to include an "offense that involves fraud or deceit in which the loss . . . exceeds $10,000," § 1101(a)(43)(M)(i), *Taylor/Shepard* determines whether the requisite elements were present in the underlying conviction.

The federal courts and the immigration agency have moreover applied some form of the categorical

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[4] The other circuits that fail to apply the *Taylor/Shepard* approach to the fraud aggravated felony provision similarly overlook *Clark* and *Leocal*. *See Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007).

approach to determine the immigration consequences of predicate criminal convictions for nearly a century. *See, e.g., Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137, 145-46 (2d Cir. 2008); *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 515 (BIA 2008). Congress enacted the illegal re-entry sentencing enhancement and aggravated felony statutes against this backdrop. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (first codifying "aggravated felony,"); Pub. L. No. 100-690 § 7345, 102 Stat. 4471 (amending § 1326(b) to provide a fifteen-year enhancement for re-entry after deportation subsequent to an aggravated felony conviction). Section 1101(a)(43)(M)(i) was added in 1994, four years after the *Taylor* decision. Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321-22. Congress is presumed to know the judicial and administrative agency backdrop against which it legislated and did not, post-*Taylor*, express a countervailing intent in either § 1101(a)(43)(M)(i) or in the illegal re-entry and removal statutes, respectively. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978); *In re Velazquez-Herrera*, 24 I. & N. Dec. at 515. Thus, "Congress is presumed . . . to [have] adopt[ed] that [categorical approach] interpretation." *See Lorillard*, 434 U.S. at 580.

Taylor/Shepard is not an approach adopted for convenience. Rather, it stems from fundamental Sixth and Fourteenth Amendment rights. These rights "guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact

essential to increase the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25. Unless all facts necessary for sentencing enhancement are based on a jury finding or plea admission by the defendant, the enhancement violates these rights and collides with this Court's holding in *Apprendi* and progeny. *See Apprendi v. New Jersey*, 530 U.S. 466, 487-88 (2000) (distinguishing *Almendarez-Torres* because defendant there admitted to prior convictions in plea). *Taylor/Shepard* accordingly "limit[s] the scope of judicial fact-finding" to avoid serious risk of rendering sentencing enhancement statutes unconstitutional. *See Shepard*, 544 U.S. at 25-26.

Taylor/Shepard contemplates two steps. First, the categorical approach dictates that a court applying a statutory sentencing enhancement "look only to the fact of conviction and the statutory definition of the prior offense." *See Shepard*, 544 U.S. at 17 (quotation marks omitted). Using only these materials, the court then examines whether the elements of the statute of conviction are the same as those required for the statutory enhancement. Where the statute of conviction contains all necessary elements, *Taylor/Shepard* is satisfied. *See Taylor*, 495 U.S. at 599.

Second, the Court created an exception, the so-called "modified categorical approach," for a "narrow range of cases" in which the statute of conviction is broader than the definition in the enhancement statute. *Taylor*, 495 U.S. at 602; *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007). In these cases, the statute of conviction contains a series of

disjunctive elements and the fact of conviction does not indicate "which of [the] series of disjunctive elements a defendant's conviction satisfies." *United States v. Gonzales-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008) (quotation marks omitted). The modified categorical approach permits a "sentencing court to go beyond the mere fact of conviction in [this] narrow range of cases [to determine whether] a jury was actually required to find all the elements" needed for the statutory enhancement. *Taylor*, 495 U.S. at 602. A statute of conviction susceptible to application of the modified categorical approach is sometimes referred to as a "divisible" statute. *Gertsenshteyn*, 544 F.3d at 143.

In the case of a jury verdict, the modified approach permits examination of the "indictment or information and jury instructions . . . [to determine if] the jury necessarily had to find" all the elements required for the statutory enhancement. *Taylor*, 495 U.S. at 602. In the case of a guilty plea, the examination "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26. The sentencing court may not look to other non-comparable documents, including police reports or complaint applications. *See id.* at 16. Nor may the court look to materials that "might shed light on what the defendant *probably* did or *probably* admitted to, or what the jury *probably* found." *In re Sealed Case*, 548 F.3d 1085, 1090 (D.C. Cir. 2008).

Petitioner prevails under the strict categorical approach: the fraud statute under which he was convicted contains no loss provision. The analysis should go no further because a fraud statute of conviction that does not contain a loss provision is not susceptible to the modified categorical approach to determine whether the offense falls within the aggravated felony definition. As the Ninth and Fifth Circuits have held, *Taylor/Shepard* requires that "the statute of conviction must contain every element of the [enhancing offense] before we resort to the modified categorical approach." *Kawashima v. Mukasey*, 530 F.3d 1111, 1116 (9th Cir. 2008); *see Gonzales-Terrazas*, 529 F.3d at 297-98.

This application of the rule is true to *Taylor*'s dictates, for when the underlying statute is "missing an element of the [enhancing offense] altogether, we can never find that 'a jury was actually required to find all elements of' the [enhancing offense]." *Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring).[5] To hold otherwise would be to "call

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[5] The Third Circuit's suggestion that "insistence on loss as [a] part of the [convicted] conduct would render § 1101(a)(43)(M)(i) largely inoperative," *Nijhawan*, 523 F.3d at 398, is simply incorrect. As Petitioner notes, numerous federal and state fraud statutes either include a loss amount element or would lead to guilt phase findings establishing loss. *See* Pet. Brief Appendix at 1a-12a. Furthermore, in federal cases, loss amounts will be found by a reasonable doubt standard where the Government seeks an increased fine under 18 U.S.C. § 3571(d) (authorizing fine of up to "twice the gross loss" caused). *See United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) ("[T]he Sixth Amendment requires that any fact (other than the fact of prior conviction) that

into question the categorical approach's commitment to a limited review of the 'fact of conviction,' rather than the 'particular factual circumstances' underlying a conviction." *Dulal-Whiteway v. DHS*, 501 F.3d 116, 127 (2d Cir. 2007) (internal citation omitted). Interpreting a statute to encompass an element it does not explicitly contain rings of result-oriented jurisprudence, not the fairness mandated by Due Process and *Taylor/Shepard*. *Cf. Michel v. INS*, 206 F.3d 253, 264 (2d Cir. 2000) (lauding the categorical approach as "the essence of evenhanded administration of the law to define rules *ex ante* and apply them regardless of the particular circumstances of a given case.").

Moreover, as *Shepard* held, the constitutional doubt canon requires a narrow construction of the categorical approach. *See* 544 U.S. at 24-26. *Shepard* observed that the existence of all requisite elements in the record of the prior conviction used to enhance a sentence ameliorates constitutional concerns under *Apprendi*. *See id.* at 25; *see also United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004) (en banc) (per curiam) ("The elements of an offense of course come from the statute of conviction . . . not from the particular manner and means that attend a given violation of the statute."). But when facts beyond the elements are at issue, disputes on those facts "raise[] the concern underlying *Jones* and *Apprendi*: the Sixth and

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increases the maximum 'penalty' for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt.").

Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of the potential sentence." *Shepard*, 544 U.S. at 25.[6]

While the Court need not reach the issue here, there are situations in which a loss finding during the guilt determination phase would be permissible despite the absence of loss as an element of the underlying offense.[7] Specifically, where a loss finding is required to increase the maximum sentence for the underlying offense, such a finding would satisfy *Taylor* and avoid constitutional doubt. Prosecutors must ask a jury to find any fact that is the basis for an increased maximum sentence. *See Apprendi*, 530 U.S. at 490; *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004); *United States v. Booker*, 543 U.S. 220, 230-31 (2005). Federal law requires such findings regarding loss amount in certain circumstances. *See* 18 U.S.C. § 3571(d); *United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006). Such findings may also be made under state law. *See, e.g.*, 720 ILCS 5/16-1. A jury finding or plea admission in these circumstances comports with *Taylor/Shepard* because the finding or

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[6] Justice Thomas suggested not constitutional doubt but constitutional error would result if a broader range of evidence were considered. *See Shepard*, 544 U.S. at 28 (Thomas, J., concurring).

[7] Petitioner prevails under either the strict or modified categorical approach because there is no evidence in his case that satisfies *Taylor/Shepard*.

admission of loss is "necessary." *See Shepard*, 544 U.S. at 25.

Despite the dictates of *Taylor/Shepard*, there is another view that would permit use of the modified categorical approach where the underlying statute broadly prohibits one type of generic conduct, and a defendant could commit the conduct both in ways that trigger the enhancement and in ways that would not. *See Gonzales-Terrazas*, 529 F.3d at 299-300 (Owen, J., concurring). Under this view, the modified categorical approach is applied "even [though] the statute under which the defendant was prosecuted lacks all the requisite elements." *Id.*

Putting aside the question of when a statute of conviction is susceptible to the modified categorical approach, it is well-settled that all approaches forbid the scouring of evidence outside of what was charged and proven at trial or admitted by plea.[8] *See, e.g., In*

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[8] The Government erroneously contends that insistence on a loss finding as part of the convicted conduct would nullify the companion provision, Section 1101(a)(43)(M)(ii). Gov't Opp. to Cert. at 8. This is incorrect. An element of 26 U.S.C. § 7201 is "the existence of a tax deficiency." *Boulware v. United States*, 128 S. Ct. 1168, 1172 (2008) (internal citation omitted). "The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Holland v. United States*, 348 U.S. 121, 138 (1954); *see also United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001). Thus, there will be instances in which evidence of loss amount will be available in tax evasion cases that was proven beyond a reasonable doubt. Furthermore, because section 1101(a)(43)(M)(ii), defines a tax evasion aggravated felony as "an offense that . . . is described in" 26 U.S.C. § 7201, it is not limited to violations of the federal tax code. As the Second

re Sealed Case, 548 F.3d at 1093 (noting *Shepard*'s "rejection of otherwise reliable evidence" that fell outside these bounds). Therefore, even applying the modified categorical approach, courts may not resort to the evidence that the Third Circuit and the Government would permit. To do so would raise serious constitutional questions under the Sixth and Fourteenth Amendments in the criminal law context. Therefore, the *Taylor/Shepard* approach governs whether an individual has been "convicted of" a Section 1101(a)(43)(M)(i) fraud offense, whether for immigration or criminal purposes.

Finally, nothing in *United States v. Hayes*, No. 07-608, 2009 U.S. LEXIS 1634 (U.S. Feb. 24, 2009), supports a contrary conclusion. Fundamentally, *Hayes* is inapposite. *Hayes* concerned 18 U.S.C. § 922(g)(9), which criminalizes the possession of a firearm by anyone previously "convicted . . . of a misdemeanor crime of domestic violence." The Court concluded that the prior conviction requirement is an element of a Section 922(g)(9) offense. *Taylor* and *Shepard*, by contrast, concerned sentence enhancement statutes that based increased maximum sentences on the existence of certain predicate offenses. *Taylor*, 495 U.S. at 599; *Shepard*,

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Circuit explained in *Gertsenshetyn* regarding another aggravated felony provision, such language encompasses state laws that criminalize the offenses "described in" the referenced federal statute. 544 F.3d at 147. There are state offenses "described in" Section 7201 that contain a loss element. *See, e.g.*, Tex. Tax Code § 151.7032(b) (separating misdemeanors from felonies based on the amount of tax deficiency or loss); D.C. Code § 47-4102 (same).

544 U.S. at 16-17. Section 1326(b) is also such a statute.

Without mentioning *Taylor* or *Shepard* – which apply in a different context – the *Hayes* majority held that the domestic relationship aspect of the prior misdemeanor offense required to violate 922(g)(9) does not have to have been an element of that prior offense. The domestic relationship element must, however, be established beyond a reasonable doubt, just like any other element in a Section 922(g)(9) prosecution. *Hayes*, 2009 U.S. LEXIS 1634, at *20. And, while this Court has found that the fact of a prior conviction for purposes of a sentence enhancement statute is not an element that must be found by a jury beyond reasonable doubt, *see Shepard*, 544 U.S. at 24-25 (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)), *Taylor* and *Shepard* require the fact of the prior conviction must nonetheless be based solely on the record of what was charged and either proven to a jury, or admitted by plea, in the prior proceeding. *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 20-21. This is necessary to avoid the "serious risks of unconstitutionality" that would otherwise arise. *Shepard*, 544 U.S. at 25. While *Hayes* did not apply the *Taylor/Shepard* method due to the different context in which it arose, the majority's holding reaffirmed the central role of the Sixth Amendment in determining the nature of a prior conviction.

D. By contrast, the Government's approach would impermissibly invite inquiry into a broad range of nonconvicted conduct to determine whether an individual was "convicted of" a section 1101(a)(43)(M)(i) fraud offense.

The Third Circuit's approach in *Nijhawan* establishes an ill-defined "tethering" test that unavoidably and impermissibly invites inquiry into conduct beyond that charged and proven or admitted by plea in the underlying criminal case. Whatever else it may mean, the Third Circuit's approach permits courts to consider nonconvicted conduct. *See Nijhawan*, 523 F.3d at 394.

The Government would govern further, permitting consideration in a removal proceeding of nonconvicted conduct contained in the underlying criminal case record, such as evidence from the sentencing phase, as well as evidence outside of the underlying record altogether, such as new testimonial evidence introduced at the removal hearing. *See* Gov't Opp. to Cert. at 11 (citing *In re Silva-Trevino*, 24 I. & N. Dec. 687, 702-03 (A.G. 2008)); *Babaisakov*, 24 I. & N. Dec. at 321.

In even its most conservative application, the Third Circuit's standard permits use of nonconvicted facts, thereby expanding the scope and rules of permissible evidence to severely undermine reliability and *Apprendi* principles. Should the Third Circuit's test converge with the Government's view, judges could determine the underlying loss amount based on pre-sentence investigation ("PSI") reports, police reports, or select evidence from the

prior trial or even a subsequent hearing.[9] *See Nijhawan*, 523 F.3d at 401 (Stapleton, J., dissenting).

The majority relied on two nonconvicted facts to find the loss amount under § 1101(a)(43)(M)(i) satisfied: (1) the "total loss" amount entered by the judge in the judgment of conviction, for which restitution was ordered, and (2) Mr. Nijhawan's sentencing stipulation concerning loss amount for purposes of calculating his Sentencing Guidelines offense level. *See id.* at 389, 395.

While calculated with different parameters, both restitution and loss findings determined at sentencing are made in a less rigorous environment than guilt phase findings and may be based on conduct well beyond that of which a defendant was convicted. Most significantly, the Government's burden of proof at sentencing for establishing these figures is only a preponderance of the evidence. *See* 18 U.S.C. § 3664(e) (restitution); *United States v. Pira*, 535 F.3d 724, 728 (7th Cir. 2008) (loss amount), *cert. denied*, 129 S. Ct. 583 (2008); *United States v. Erhart*, 415 F.3d 965, 970-71 (8th Cir. 2005) (loss amount); *People v. Consalvo*, 303 A.D.2d 202, 202 (N.Y. App. Div. 2003) (restitution); *see also Booker*,

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[9] Even the Third Circuit recognized the inappropriateness of basing an aggravated felony determination on mere "relevant conduct," asserting that its "tethered" requirement "exclud[es] consideration of relevant conduct." *Nijhawan*, 523 F.3d at 398 n.9. The Government also opaquely asserts that "DHS must prove a connection between the loss and the specific conduct" that led to conviction. *See Babaisakov*, 24 I. & N. Dec. at 321 n.12. Despite these ill-defined qualifications, both rules invite consideration of a broad swath of nonconvicted conduct.

543 U.S. at 227 (noting preponderance findings at sentencing). A fact found pursuant to a preponderance of the evidence standard is entirely distinct as a constitutional matter from one established beyond a reasonable doubt. Consideration of such findings is wholly inconsistent with the *Taylor/Shepard* mandate that sentencing enhancement elements be "actually found" by a jury or "necessarily admitted" by the defendant, consistent with *Apprendi* Sixth Amendment protections. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602.

In addition, evidence presented at sentencing is not subject to the normal evidentiary rules that ensure its reliability. *See, e.g., State v. Jeppesen*, 57 P.3d 782, 786 (Idaho 2002) (rules of evidence, except privilege rules, inapplicable); *State v. Gulledge*, 487 S.E.2d 590, 594-95 (S.C. 1997) (rules of evidence inapplicable at sentencing and restitution hearing). Sentencing judges are "largely unlimited" in the kind and source of information they may consider. *See United States v. Tucker*, 404 U.S. 443, 446 (1972). They may for example rely upon hearsay. *United States v. Omole*, 523 F.3d 691, 702 (7th Cir. 2008).

Similarly, at sentencing defendants lack the same Sixth Amendment right to confrontation and due process protections that protect them at trial. *See United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007) (Confrontation Clause does not apply to sentencing proceedings); *State v. Dumont*, 507 A.2d 164, 167 (Me. 1986) (no per se due process right to cross examination in state sentencing proceedings).

Those rights contribute fundamentally to the integrity and reliability of findings of conviction.

In calculating restitution and applying the Sentencing Guidelines, federal courts include nonconvicted conduct. Restitution may be ordered for a victim not named in the indictment. *See United States v. Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004) (collecting cases). A court "may order restitution 'for acts of related conduct for which the defendant was not convicted.'" *United States v. Lawrence*, 180 F.3d 838, 846 (9th Cir. 1999) (internal citation omitted). And, in at least one Circuit, restitution may include losses caused by conduct outside of the statute of limitations of the offense. *See Dickerson*, 370 F.3d at 1342.[10]

As a factor under the Sentencing Guidelines, "loss" calculations are subject to even greater inclusion of nonconvicted conduct than restitution findings at sentencing. In calculating loss pursuant to the Guidelines, "The court need only make a reasonable estimate." U.S.S.G. § 2B1.1 Application

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[10] The Third Circuit's reliance on a restitution figure contained in a judgment of conviction was also erroneous because *Taylor*/*Shepard* limits the inquiry to evidence "actually found" by a jury or "necessarily admitted" by the defendant. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602. In the experience of amicus, judgments of conviction typically include information that is outside of that question. For example, the penalty is memorialized in the judgment. Likewise, the judge may list findings that go to collateral issues, such as whether the victim was a minor (triggering application of sex registration laws). Thus, the judgment of conviction is not a record of convicted conduct.

Notes 3(C). Moreover, these loss calculations take into account all "relevant conduct" and not merely conduct of which a defendant has been convicted. *See* U.S.S.G. § 1B1.3, Application Notes 1-2. The judge may consider unindicted and acquitted conduct in determining the loss amount. *See, e.g., United States v. Boesen*, 541 F.3d 838, 851 (8th Cir. 2008) ("A district court may consider unindicted criminal activity" and its "determination of loss need not be precise"); *United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004) ("[W]ell-settled that acquitted conduct can be taken into account in sentencing"); *Carter v. State*, 711 N.E.2d 835, 840 (Ind. 1999) (uncharged crimes may be considered); *see also* Hector Gonzalez et al., *Is Booker a "Loss" for White Collar Defendants?*, 20 Fed. Sent'g Rep. 181, 182 (2008) ("[L]oss calculations . . . can often be based on facts never considered – or considered and rejected – by the jury."). Even conduct that underlies charges that were dismissed may be considered. *See United States v. Phillips*, 516 F.3d 479, 483 n.4 (6th Cir. 2008).

Moreover, a defendant's ability to challenge evidence of nonconvicted conduct in a sentencing proceeding is severely circumscribed. There is no right to a hearing to challenge such evidence contained in the PSR. *See United States v. Wise*, 515 F.3d 207, 219 n.7 (3d Cir. 2008). A hearing will be granted only in the sentencing court's discretion. *Id.* At the hearing in order to prevail the defendant must show that information "relied on by the district court in the PSR is materially unreliable." *United States v. Valles*, 484 F.3d 745, 759-60 (5th Cir. 2007);

see also Carter, 711 N.E.2d at 840 (defendant generally has burden to identify errors in PSR). The defendant must produce some evidence of his own even to call the facts of the PSR into question. *United States v. Duckro*, 466 F.3d 438, 449 (6th Cir. 2006). These procedural limitations make findings at sentencing inherently less reliable than those established at trial or pled to by a defendant.[11]

These problems with the scope and integrity of nonconvicted evidence introduced at sentencing are compounded by other, practical challenges for defendants. Prior to conviction, defendants lack adequate means to establish or rebut evidence regarding conduct that does not prove or disprove the elements required for conviction. Post-conviction, the sentencing procedures for such effort are inadequate. During a criminal case, a defense attorney has less incentive and ability to litigate facts that are not dispositive with respect to the conviction. Many discovery rights go principally to assist in litigating guilt. *See* 18 U.S.C. § 3500 (requiring discovery occur after testimony)[12]; Fed. R. Crim P. 16 (targeting disclosure of evidence applicable to trial). Moreover, where loss is not a charged element of the offense, a criminal defendant

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[11] The "stipulation for sentencing purposes" on which the Court relies, *Nijhawan*, 523 F.3d at 389, arose from this same sentencing context that permits inclusion of non-convicted, "relevant conduct." Such post-conviction or post-plea stipulations therefore do not establish that the stipulated amount is the loss amount for which defendant was *convicted*.

[12] As previously noted, there is no per se right to an evidentiary hearing at sentencing. *See supra*, at 24.

has "no reason to cast doubt on the Government's evidence as to amount of loss" at trial, and such evidence would "probably [be] excluded as irrelevant." *Li*, 389 F.3d at 900 (Kozinski, J., concurring).

Finally, for many defendants, it is pointless to challenge restitution findings that the Court is required to make, but defendants are unable to pay. *See* 18 U.S.C. § 3663A(1)(a) (mandatory restitution). The Government has wide latitude in admissible evidence and a lesser burden of proof. The defendant faces extraordinary difficulty in challenging the Government's assertions, and risks detrimental treatment under the Guidelines should he fail. *See generally United States v. Cannel*, 517 F.3d 1172, 1176-77 (9th Cir. 2008) (Government entitled not to move for acceptance of responsibility adjustment where defendant challenged PSR findings); *United States v. Quinonez*, Case No. CR-02-27-E-BLW, 2006 U.S. Dist. LEXIS 82780, at *8 (D. Idaho Nov. 13, 2006) (applying upward adjustment for obstruction of justice based on defendant's sentencing hearing testimony).

E. The criminal rule of lenity favors construing Section 1101(a)(43)(M)(i) to require application of the *Taylor/Shepard* approach.

Even apart from constitutional doubt, the criminal rule of lenity requires applying *Taylor/Shepard* to the fraud aggravated felony definition. *See generally Crandon v. United States*, 494 U.S. 152, 158 (1990) ("because the governing standard is set forth in a criminal statute, it is

appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage").

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). Thus, ambiguity in Section 1101(a)(43)(M)(i) should be resolved in favor of criminal defendants – this means proscribing an approach that would permit a free-ranging inquiry into nonconvicted conduct. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997); *Crandon*, 494 U.S. at 158.

These observations are entirely apt here. In the criminal context, the scope of evidence that may be considered in determining whether a prior conviction falls within Section 1101(a)(43)(M)(i) will determine whether a criminal defendant faces an increased maximum penalty of 20 years in prison under 8 U.S.C. § 1326(b)(2). Abandonment of *Taylor/Shepard* would mean a defendant could not know what evidence will later determine whether the conviction was for an aggravated felony. This is precisely the problem the rule of lenity works to avoid.

Just last term, Justices Scalia, Souter, and Ginsburg explained that lenity is an important concern in dual use statutes that have criminal applications. *See United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (opinion of Scalia, Souter, Ginsburg, JJ.).[13] After restating the principles established in *Clark*, the opinion explained, "Our obligation to maintain the consistent meaning of words in statutory text does not disappear when the rule of lenity is involved. . . . If anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Id.*; *see also Hayes*, 2009 U.S. LEXIS 1634, at *38 (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history."). Twenty years imprisonment is far too much to "hinge on the will-o'-the-wisp of statutory meaning." *Hayes*, 2009 U.S. LEXIS 1634, at *38.

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[13] Those same Justices joined by Justice Stevens explained in dissent in *Almendarez-Torres* that even "where the doctrine of constitutional doubt does not apply, the same result may be dictated by the rule of lenity, which would preserve rather than destroy the criminal defendant's right to jury findings beyond a reasonable doubt." *Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia, J., dissenting). "Whichever doctrine is applied for the purpose, it seems to me a sound principle that whenever Congress wishes a fact to increase the maximum sentence without altering the substantive offense, it must make that intention unambiguously clear." *Id.* Notably, "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, 544 U.S. at 27 (Thomas, J., concurring in part and in the judgment).

II. Abandoning Application of *Taylor/Shepard* to Section 1101(a)(43)(M)(i) Would Compromise the Ability to Understand the Consequences of Fraud Convictions.

A. Criminal defense attorneys have a duty to advise clients of the criminal consequences of convictions for deportable offenses.

For noncitizen and citizen defendants alike, the "[d]isposition of charges after plea discussions is . . . an essential part" of the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Over 95% of all federal criminal cases in 2007 were resolved by guilty plea. *See* U.S. Sentencing Comm'n, 2007 Sourcebook of Federal Sentencing Statistics, Fig. C. Increasingly, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello*, 404 U.S. at 260.

Criminal defense attorneys in plea negotiations have well-recognized duties to investigate all relevant considerations and advise their clients accordingly:

> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a

> plea unless appropriate investigation and study of the case has been completed.

ABA Standards for Criminal Justice, Standard 14-3.2(b) (3d ed. 1999).

While this duty represents a broader professional responsibility, Sixth Amendment ineffective assistance cases are instructive. There is little doubt that the "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempha v. Rhay*, 389 U.S. 128, 134 (1967). This includes advising on plea bargains to ensure that defendants are "fully aware of the direct consequences" of their sentences, "including the actual value of any commitments made to him by the court, prosecutor, or his own counsel" in terms of the length and terms of those sentences. *Brady v. United States*, 397 U.S. 745, 755 (1970) (quotation marks omitted).

Absent such advice, the criminal defendant may unknowingly consent to harsher criminal penalties. This Court's "jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). Thus, an attorney's advice on criminal penalties – or failure to provide such advice – can be critical to the defendant. Certainly, criminal defense attorneys have an ethical responsibility to advise their clients fully about possible criminal penalties stemming from a conviction. *See* ABA Standards for Criminal Justice, Standard 14-3.2(b).

Convictions for deportable offenses typically affect the amount of time a defendant will spend in jail as compared with alternative forms of confinement, as well as the conditions of confinement while in jail. For instance, noncitizens convicted of a deportable offense generally are ineligible for community-based sentences. United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System*, Jan. 2009, at 23 n.42 *available at http://www.ussc.gov/general/20090206_Alternatives.pdf*, ("*Alternative Sentencing*"). This generally excludes them from alternative confinement conditions allowed under the federal Sentencing Guidelines such as community confinement (in a treatment center or halfway house), home detention, or intermittent confinement. *Id.* at 2.[14]

Moreover, in the federal system, "deportable alien" status is a Public Safety Factor, alongside "sex offender" or "threat to government official," used for federal inmate classification to determine the "most appropriate security level institution." Federal Bureau of Prisons, Program Statement P5100.08: *Inmate Security Designation and Custody Classification*, at 5-5, 5-8 to 5-9 (Sept. 12, 2006), *available at* http://www.bop.gov/policy/progstat/5100_008.pdf ("*BOP Program Statement*"). When the factor is applied, "the inmate or the long-term detainee shall be housed in at least a Low security

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[14] Also, whether in the federal or state system, such options generally are unavailable to noncitizens convicted of a deportable offense because they are typically subject to immigration holds or "detainers" issued under 8 C.F.R. § 287.7.

level institution." *Id.* at 5-9. The "Bureau of Prisons assigns deportable aliens to confinement at their second highest custody level, which requires a normal level of institutional supervision and prohibits work details or other programs outside the secure perimeter of the institution." *Alternative Sentencing*, at 4. Consequently, the inmate is ineligible for placement "at an institution which would permit inmate access to the community." *BOP Program Statement*, at 2-4. The resulting differences in terms of confinement are striking. In fiscal year 2007, 86.3% of the 2,166 noncitizen offenders sentenced at the lowest level of the guidelines (Zone A) were given imprisonment only (no alternative sentence). By contrast, only 18.1% of the 2,744 citizen offenders in Zone A were given imprisonment only. *See Alternative Sentencing*, at 5 (tbls. 4 & 5). "Because of these sentencing policies, rates of alternative sentences are substantially different for United States citizen and non-citizen offenders." *Id.* at 4.

Thus, there are criminal sentencing implications for conviction of deportable offenses. An interpretation of Section 1101(a)(43)(M)(i) that leaves unclear what evidence renders one an "aggravated felon" would undermine the ability of defense counsel to advise their clients regarding these consequences.

B. Immigration consequences also affect plea negotiations.

In *INS v. St. Cyr*, this Court recognized that immigration consequences often play a central role

in plea negotiations. *See INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001). This Court's reasoning pragmatically recognized that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 323; *see also* ABA Standards for Criminal Justice, Standard 14-3.2(f) & commentary at 127 ("[I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.").

Under the present consensus on professional ethics, competent defense counsel must inform noncitizens of potential immigration consequences of a plea. *See St. Cyr*, 533 U.S. at 322 n.48 (citing authorities); ABA Standards for Criminal Justice, standard 14-3.2 (f).

The ability to apprehend immigration consequences is no less vital for prosecutors. As Robert Johnson, a former president of the national district attorneys association, explained:

> [A]s prosecutors, we see the effects of these collateral consequences. . . . Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge. . . . As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.

Message from the President Robert M.A. Johnson, Nat'l Dist. Atty's Ass'n, May/June 2001, http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html ("Message from the President, NDAA").

C. The Third Circuit's approach magnifies uncertainty during plea negotiations.

The *Taylor/Shepard* doctrine confers both finality and predictability on criminal adjudication, thereby promoting rational and orderly plea-bargaining. By departing from *Taylor/Shepard*, the Third Circuit – and even more so the Government's embrace of the BIA's unprecedented decision in *Babaisakov* – threaten to undermine the ability to apprehend a proposed plea's consequences when deciding whether to plead guilty, the issue at the center of the *St. Cyr* decision.

In permitting the use of findings made after the guilty plea, the Third Circuit rewrites the bargain between noncitizen defendants and the Government at a point where it is effectively too late for that bargain to be undone. Such an approach is irreconcilable with the text of Section 1101(a)(43)(M)(i), which requires the noncitizen to have been "convicted" of such conduct as a prerequisite for the aggravated felony label to attach.

Furthermore, criminal defense lawyers determining whether a conviction will render a noncitizen client deportable must confront the "labyrinthine character of modern immigration law – a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the

Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). When it comes to immigration law, "the issues are seldom simple and the answers are far from clear." *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1308 (11th Cir. 2000). The Third Circuit's decision erodes one of the few remaining pillars of relative certainty, adding an additional and unpredictable variable to a calculus that is already extremely complex.

Preserving some measure of predictability under the present regime has implications for everyday practice. Currently, criminal attorneys investigating whether a conviction would constitute a deportable offense may examine widely circulated and continually updated "checklists" and other practice guides that discuss immigration consequences of a given offense under the penal code in the pertinent jurisdiction. *See, e.g.*, Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law And Crimes* § 4:19 (2008); Manuel D. Vargas, *Representing Immigrant Defendants in New York*, Appendix A (4th ed., NYSDA 2006).

Under the Third Circuit's approach – and even more so under the Government's approach – the value of such resources would be greatly diminished. The "aggravated felony" definition would turn not on the offense of conviction, but on a wide array of case-specific information that comes to light only *after* the plea is entered, much of it unknown, even unknowable, at the time of the plea. Moreover, whether such information enters the record at all depends upon hard-to-verify idiosyncrasies of state

and local practices concerning conviction forms and evidentiary practices.

The tactical and strategic calculations would thus prove ever more vexing under the Third Circuit's and the Government's approach. Indeed, the *raison d'être* of plea negotiations is often that the Government is not yet prepared to show its hand, as doing so could "disrupt ongoing investigations and expose prospective witnesses to serious harm." *United States v. Ruiz*, 536 U.S. 622, 631-32 (2002) (internal quotation marks omitted). Without any practical or legal ability to compel adequate discovery, a criminal defense attorney would be hard-pressed to recommend a plea offer that, in all other respects, might be the best option available to the client.

D. The Third Circuit's approach could lead to burdensome and inefficient proceedings subsequent to entry of a plea.

Even assuming, *arguendo*, that defense counsel were able to fully identify the legal issues and the sources of evidence relevant to their clients, the most formidable challenges would still lie ahead.

Recognizing the myriad of obstacles impairing accurate fact-finding at immigration hearings, such as the absence of a right to appointed counsel or possible years of delay, criminal defense counsel may feel it necessary to conduct a full-scale factual investigation in a prophylactic effort to place in the criminal case record evidence that *disproves* any loss scenario with immigration consequences. The defense attorney would need not only to uncover

evidence challenging the amount of loss, but also evidence disputing that any loss figure is, in fact, "tethered" to the offense of conviction. *See Nijhawan*, 523 F.3d at 395.

Besides diverting significant resources from defense counsel, prosecutors, and the court, such a strategy would likely prove unworkable in practice. First, although "defendants are entitled to due process protection in the sentencing hearing, they are not entitled to the same degree of process as they would be entitled at trial." *United States v. Radix Labs., Inc.*, 963 F.2d 1034, 1039 (7th Cir. 1992). Furthermore, as Judge Kozinski observed, a criminal court could refuse to entertain fact disputes regarding issues of loss amount (to say nothing of the "tethering" of loss) not relevant to any issue in the criminal case. *See Li*, 389 F.3d at 900 (Kozinski, J., concurring) (noting such evidence would "probably [be] excluded as irrelevant").

Finally, sometimes a defendant's best option might be to withdraw the plea altogether and go to trial. For example, where subsequent to pleading guilty the defendant is confronted with new evidence with respect to loss amount (such as a new witness), it may be nearly impossible to adequately confront such evidence at the sentencing phase. A defendant, however, does not enjoy an unfettered right to withdraw his guilty plea. Fed. R. Crim. P. 32(e). For example, the Third Circuit has noted that "[a] shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the [G]overnment the expense, difficulty, and risk of

trying a defendant who has already acknowledged his guilt by pleading guilty." *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001) (quotation marks omitted).

If *Taylor/Shepard* is not applied to Section 1101(a)(43)(M)(i), a number of noncitizen defendants may opt for trial rather than live with the multiplied uncertainty of the new regime, in which pleading guilty even to relatively minor offenses could expose defendants to certain deportation and criminal penalties. Perhaps more troublingly, other noncitizen defendants will plead guilty to offenses and will, contrary to their reasonable expectations, later be deemed aggravated felons.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be reversed.

Respectfully submitted,

Joshua L. Dratel
Co-Chair, Amicus
Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
JOSHUA L. DRATEL, P.C.
2 Wall Street, Third Floor
New York, NY 10005
(212) 732-0707

Iris E. Bennett*
Anjan Choudhury
Michael A. Hoffman
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000

David A. Newman
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

* *Counsel of Record*

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